TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible] 499

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS AND AMERICAN SURETY COMPANY OF NEW YORK, PETITIONERS,

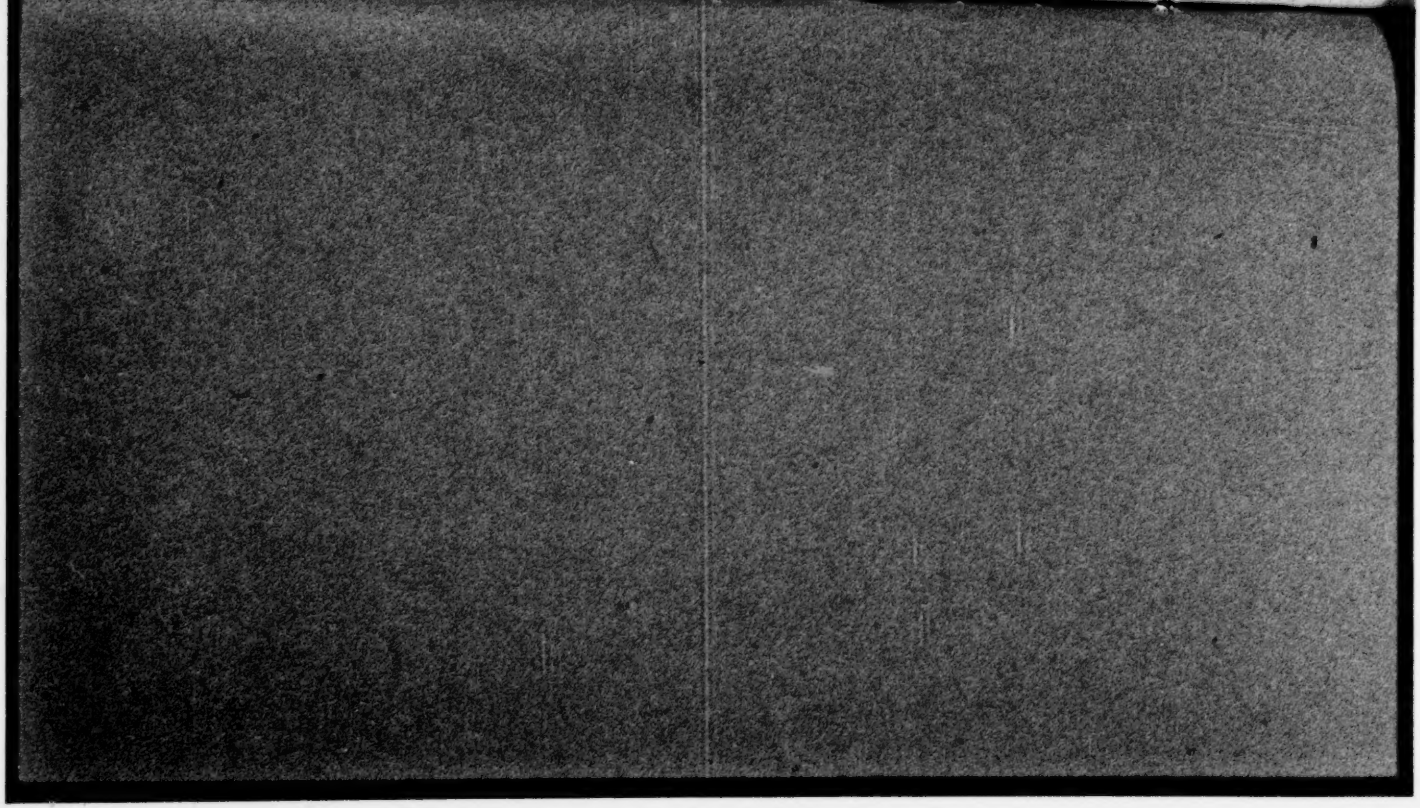
vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED JANUARY [illegible], [illegible].
CERTIORARI AND RETURN FILED APRIL 21, [illegible].

(23,217)



(23,517)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 942.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS AND AMERICAN SURETY COMPANY OF NEW YORK, PETITIONERS,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 21, 1913.

UNITED STATES OF AMERICA.

IN THE

United States Circuit Court of Appeals

FIFTH JUDICIAL CIRCUIT.

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the first Monday in November, A. D. 1912, at Fort Worth, Texas, before the Honorable Don A. Pardee and the Honorable David D. Shelby, Circuit Judges, and the Honorable Rufus E. Foster, District Judge.

Missouri, Kansas & Texas Railway Company,
Plaintiff in Error,
versus
The United States of America,
Defendant in Error.

Be It Remembered, that heretofore, to-wit, on the 22nd day of July, A. D. 1912, a transcript of the record of the above styled cause, pursuant to a writ of error to the District Court of the United States for the Eastern District of Texas, was filed in the office of the clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2402, as follows:

IN THE

United States Circuit Court of Appeals

FIFTH CIRCUIT.

NUMBER .....

MISSOURI, KANSAS & TEXAS RAILWAY CO., PLAINTIFF IN ERROR,

VS.

UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

BE IT REMEMBERED, that at a regular term of the District Court of the United States for the Eastern District of Texas and in the Fifth Circuit, begun and held in the court room of said court in the City of Sherman, Texas, in said Circuit and District on Monday, the 20th day of May, A. D., 1912, it being the third Monday in said month, there were present, Honorable Gordon Russell, United States District Judge for the Eastern District of Texas; J. W. Ownby, Esq., United States District Attorney, J. B. Dailey, Esq., Assistant United States District Attorney, Dupont B. Lyon, Esq., United States Marshal, and J. R. Blades, Clerk. When court opened in due form by order of the judge the following proceedings were had, to-wit:

CONSOLIDATED CAUSES AT LAW NOS. 32 AND 34.

United States of America,
vs.
Missouri, Kansas & Texas Railway Company of Texas.

Plaintiff's Original Petition in Cause No. 32.

In the District Court of the United States for the Eastern District of Texas.

Division .....

The United States of America, Plaintiff,
vs.
Missouri, Kansas & Texas Railway Company of Texas, Defendant.

No. 32.

Now comes the United States of America, by James W. Ownby, United States Attorney for the Eastern District of Texas, and brings this action on behalf of the United States against the Missouri, Kansas & Texas Railway Company of Texas, a corporation organized and doing business under the laws of the State of Texas, and having an office and place of business at Denison, in the State of Texas; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said commission.

FOR A FIRST CAUSE OF ACTION,

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in Interstate Commerce by railroad in the State of Texas.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 12:50 o'clock A. M., on November 30, 1911, upon its line of railroad at and between the stations of Dallas, in the State of Texas, and Denison, in said State, within the jurisdiction of this court, required and permitted its certain engineer and employe, to-wit, E. E. Stone, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit, from said hour of 12:50 o'clock A. M. on said date, to the hour of 8:30 o'clock P. M. on said date.

Plaintiff further alleges that said employe, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 622, drawn by its own locomotive engine No. 562, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A SECOND CAUSE OF ACTION,

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in Interstate Commerce by railroad in the State of Texas.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 12:50 o'clock A. M. on November 30, 1911, upon its line of railroad at and between the stations of Dallas, in the State of Texas, and Denison, in said State, within the jurisdiction of this court, required and permitted its certain fireman and employe, to-wit, J. A. Blackburn, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit, from said hour of 12:50 o'clock A. M. on said date, to the hour of 8:30 o'clock P. M. on said date.

Plaintiff further alleges that said employe, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 622, drawn by its own locomotive engine No. 562, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A THIRD CAUSE OF ACTION,

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in Interstate Commerce by railroad in the State of Texas.

Plaintiff further alleges that in violation of the Act

of Congress, known as "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 12:50 o'clock A. M. on November 30, 1911, upon its line of railroad at and between the stations of Dallas, in the State of Texas and Denison in said State, within the jurisdiction of this court required and permitted its certain conductor and employe, to-wit, E. V. Kile, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit, from said hour of 12:50 o'clock A. M. on said date, to the hour of 8:30 o'clock P. M. on said date.

Plaintiff further alleges that said employe, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 622, drawn by its own locomotive engine No. 562, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A FOURTH CAUSE OF ACTION,

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in Interstate Commerce by railroad in the State of Texas.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety

of employes and travelers upon railroads by limiting the hours of service of employes thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 12:50 o'clock A. M. on November 30, 1911, upon its line of railroad at and between the stations of Dallas, in the State of Texas, and Denison, in said State, within the jurisdiction of this court, required and permitted its certain brakeman and employe, to-wit, J. E. McCarty, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit, from said hour of 12:50 o'clock A. M. on said date, to the hour of 8:30 o'clock P. M. on said date.

Plaintiff further alleges that said employe, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 622, drawn by its own locomotive engine No. 562, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A FIFTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in Interstate Commerce by railroad in the State of Texas.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employes and travelers upon railroads by limiting

the hours of service of employes thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 12:50 o'clock A. M. on November 30, 1911, upon its line of railroad at and between the stations of, Dallas in the State of Texas, and Denison in said State, within the jurisdiction of this court, required and permitted its certain brakeman and employe, to-wit, M. Dolan, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit, from said hour of 12:50 o'clock A. M. on said date, to the hour of 8:30 o'clock P. M. on said date.

Plaintiff further alleges that said employe, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 622, drawn by its own locomotive engine No. 562, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

WHEREFORE, plaintiff prays judgment against said defendant in the sum of twenty-five hundred dollars and its costs herein expended.

J. W. OWNBY,
United States Attorney.

J. B. DAILEY,
Astt. Atty.

Filed Feruary 1, 1912, J. R. Blades, Clerk.

Plaintiff's Original Petition in Cause No. 34.

In the District Court of the United States for the Eastern District of Texas.

Division .....

No. 34.

The United States of America, Plaintiff,
vs.
Missouri, Kansas & Texas Railway Company of Texas, Defendant.

Now comes the United States of America, by James W. Ownby, United States Attorney for the Eastern District of Texas, and brings this action on behalf of the United States against the Missouri, Kansas & Texas Railway Company of Texas, a corporation organized and doing business under the laws of the State of Texas, and having an office and place of business at Denison, in the State of Texas; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

FOR A FIRST CAUSE OF ACTION,

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Texas.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved

March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 6:15 o'clock, P. M., on November 11, 1911, upon its line of railroad at and between the stations of Ft. Worth, in the State of Texas, and Denison, in said State, within the jurisdiction of this court, required and permitted its certain engineer and employee, to-wit: H. T. Bryson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit: from said hour of 6:15 o'clock, P. M., on said date, to the hour of 12:05 o'clock, P. M., on November 12, 1911.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 404, drawn by its own locomotive engine No. 102, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A SECOND CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Texas.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved

March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 6:15 o'clock, P. M., on November 11, 1911, upon its line of railroad at and between the stations of Ft. Worth, in the State of Texas, and Denison, in said State, within the jurisdiction of this court, required and permitted its certain fireman and employee, to-wit: H. O. Balderbeck to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit: from said hour of 6:15 o'clock, P. M., on said date, to the hour of 12:05 o'clock, P. M., on November 12, 1911.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 404, drawn by its own locomotive Engine No. 102, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A THIRD CAUSE OF ACTION,

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Texas.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved

March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 6:15 o'clock, P. M., on November 11, 1911, upon its line of railroad at and between the stations of Ft. Worth, in the State of Texas, and Denison, in said state, within the jurisdiction of this court, required and permitted its certain conductor and employee, to-wit: J. B. Kanody, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit: from said hour of 6:15 o'clock P. M., on said date, to the hour of 12:05 o'clock, P. M., on November 12, 1911.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 404, drawn by its own locomotive engine No. 102, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A FOURTH CAUSE OF ACTION,

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Texas.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved

March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 6:15 o'clock, P. M., on November 11, 1911, upon its line of railroad at and between the stations of Ft. Worth, in the State of Texas, and Denison, in said State, within the jurisdiction of this court, required and permitted its certain brakeman and employee, to-wit: T. B. Taylor, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit: from said hour of 6:15 o'clock, P. M., on said date, to the hour of 12:05 o'clock, P. M., on November 12, 1911.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 404, drawn by its own locomotive engine No. 102, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A FIFTH CAUSE OF ACTION,

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Texas.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employes thereon," approved

March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 6:15 o'clock, P. M., on November 11, 1911, upon its line of railroad at and between the stations of Ft. Worth, in the State of Texas, and Denison, in said State, within the jurisdiction of this court, required and permitted its certain brakeman and employee, to-wit: Roy Hord, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit: from said hour of 6:15 o'clock, P. M., on said date, to the hour of 12:05 o'clock, P. M., on November 12, 1911.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 404, drawn by its own locomotive engine No. 102, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

WHEREFORE, plaintiff prays judgment against said defendant in the sum of twenty-five hundred dollars and its costs herein expended.

J. W. OWNBY,
United States Attorney.

J. B. DAILEY,
Asst. Atty.

Filed February 1, 1912. J. R. Blades, Clerk.

Defendant's Original Answer in Cause No. 32.

In the United States District Court for the Eastern District of Texas, at Sherman.

No. 32.

United States,
vs.
Missouri, Kansas & Texas Ry. Co. of Texas.

Now comes the defendant, Missouri, Kansas & Texas Railway Company, of Texas, and for answer herein says:

I.

Defendant demurs to plaintiff's original petition and says the same is insufficient in law, and of this it prays judgment of the court.

II.

Defendant specially excepts to plaintiff's petition, and says that the Act of Congress on which it is based is invalid, because Congress has no power to prescribe the hours of service of employes engaged in interstate commerce, except in so far as it may do so by virtue of the commerce clause of the Federal Constitution, and that this act is not a regulation of interstate commerce within the meaning of that clause.

III.

Defendant specially excepts to plaintiff's original petition, and says that the act upon which it is based is void, because its provisions are arbitrary and unreasonable, and there is no just basis for the classification made

in said act, the act applying alone to common carriers by railroad, and therefore it deprives the railroad companies of their property without due process of law, contrary to the fifth amendment to the Constitution of the United States.

IV.

Defendant specially excepts to plaintiff's original petition, and says that said petition is defective, in that the same does not negative the exceptions contained in the proviso 2, Section 3, of the act on which it is based.

V.

Defendant specially excepts to plaintiff's original petition, and says that it appears from said petition that the five penalties sought to be recovered in this case grow out of one act, in violation of the act on which the cause of action is based, and it appears from said petition that the five several employes named in the five several counts in said petition were employes on, and engaged in operating one and the same train and that the operation of said train constituted but one act on the part of this defendant, and if liable, that defendant is liable for only one penalty for an act in said petition alleged.

VI.

Defendant denies each and every allegation in plaintiff's petition contained and of this it demands strict proof.

VII.

For special answer herein defendant says that, if it is true, as alleged by plaintiff, that its employes were

required and permitted to labor within the hours in said petition alleged, that the labor by said employes, and work by them was the result of an unavoidable accident, and the cause thereof was unknown to defendant, or its officers, or agents in charge of said employes at the time said employes left the terminal, and that such cause could not have been foreseen by defendant, its officers, or agents in charge of said employes.

Wherefore defendant prays that it be discharged with its costs.

HEAD, SMITH, HARE & HEAD,
Attorneys for Defendant.

Filed May 24, 1912. J. R. Blades, Clerk.

Defendant's Original Answer in Cause No. 34.

In the United States District Court of the Eastern District of Texas, at Sherman.

No. 34.

United States,
vs.
Missouri, Kansas & Texas Ry. Co. of Texas.

Now comes the defendant, Missouri, Kansas & Texas Railway Company of Texas, and for answer herein says:

I.

Defendant demurs to plaintiff's original petition, and says the same is insufficient in law, and of this it prays judgment of the court.

II.

Defendant specially excepts to plaintiff's petition, and says, that the Act of Congress on which it is based is invalid, because Congress has no power to prescribe the hours of service of employes engaged in interstate commerce, except insofar as it may do so by virtue of the commerce clause of the Federal Constitution, and that this act is not a regulation of interstate commerce within the meaning of that clause.

III.

Defendant specially excepts to plaintiff's original petition, and says that the act upon which it is based is void, because its provisions are arbitrary and unreasonable, and there is no just basis for the classification made in said act, the act applying alone to common carriers by railroad, and therefore deprives the railroad companies of their property without due process of law, contrary to the fifth amendment to the Constitution of the United States.

IV.

Defendant specially excepts to plaintiff's original petition, and says that said petition is defective, in that the same does not negative the exceptions contained in the proviso 2, Section 3, of the act on which it is based.

V.

Defendant specially excepts to plaintiff's original petition, and says that it appears from said petition that the five penalties sought to be recovered in this case grow

out of one act, in violation of the act on which the cause of action is based, and it appears from said petition that the five several employes named in the five several counts in said petition were employes on, and engaged in operating one and the same train, and that the operation of said train constituted but one act on the part of this defendant, and if liable, that defendant is liable for only one penalty for an act in said petition alleged.

VI.

Defendant denies each and every allegation in plaintiff's petition contained, and of this it demands strict proof.

VII.

For special answer herein defendant says that, if it is true, as alleged by plaintiff, that its employes were required and permitted to labor within the hours in said petition alleged, that the labor by said employes, and work by them was the result of an unavoidable accident, and the cause thereof was unknown to defendant, or its officers, or agents in charge of said employes at the time said employes left the terminal, and that such cause could not have been foreseen by defendant, its officers, or agents in charge of said employes.

Wherefore defendant prays that it be discharged with its costs.

HEAD, SMITH, HARE & HEAD,
Attorneys for Defendant.

Filed May 24, 1912. J. R. Blades, Clerk.

Minutes of Trial.

Wednesday, May 29, 1912.

Court met pursuant to adjournment, present:
Honorable Gordon Russell, Judge, presiding.
J. B. Dailey, Assistant United States Attorney.
K. S. Fisher, Deputy United States Marshal.
J. R. Blades, United States Clerk.

When court being opened in due form, by order of the judge, the following proceedings were had, to-wit:

United States
vs.
Missouri, Kansas & Texas Railway Company.
Nos. 32, 34, and 35.

On this 29th day of May, 1912, this cause came on to be heard upon its merits, all parties appearing by attorneys, and announce ready for trial; whereupon came a jury of good and lawful men, to-wit: J. B. Long and eleven others, and on application of attorneys representing the defendants and plaintiffs, it is ordered that causes Nos. 32, 34 and 35 be consolidated and treated together.

Came on to be heard defendant's general and special exceptions to plaintiff's original petition, and the same being considered by the court are all overruled, to which action of the court in overruling the same, defendant in open court excepted.

And the said jury after being duly impaneled and sworn in accordance with law, and after having heard part of the evidence, the case not reaching a conclusion, consideration of the cause was postponed until tomorrow morning.

Judgment and Verdict.

Thursday, May 30, 1912.

Court met pursuant to abjournment, present:

Honorable Gordon Russell, Judge, presiding.
J. B. Dailey, Assistant United States Attorney.
K. S. Fisher, Deputy United States Marshal.
J. R. Blades, United States Clerk.

When court, being opened in due form, by order of the judge, the following proceedings were had, to-wit:

United States
vs.
Missouri, Kansas & Texas Railway Company.

Nos. 32, 34, 35.

On this day this cause coming on to be further heard, and the evidence having been concluded, and the plaintiff herein having filed a motion that the court peremptorily instruct the jury to return a verdict for the plaintiff on all of the counts, in all the causes herein and the attorneys for the defendant having presented a written motion to the court, requesting him to direct the jury to return a verdict for the defendant on all of the counts in all the causes herein, and the court having heard the arguments of the attorneys representing the plaintiff, and the attorneys representing the defendant, and being fully advised herein, is of the opinion that the law and the facts are with the plaintiff, and he therefore instructs the jury to return a verdict for the plaintiff, finding the defendant guilty on all the counts in all of the three causes herein:

Wherefore the jury on this same day, returns into open court its verdict in words and figures as follows, to-wit:

"Sherman, Texas, May 30, 1912. We, the jury, find the defendant, the Missouri, Kansas & Texas Railway Company of Texas, guilty as charged in counts Nos. 1, 2, 3, 4 and 5 in petition of case No. 32; and guilty as charged in counts Nos. 1, 2, 3, 4 and 5 in petition in case No. 34; and guilty as charged in counts Nos. 1, 2, 3, 4 and 5 of petition in cause No. 35. J. B. Long, Foreman."

Wherefore, as found by the verdict of the jury, it is adjudged and decreed by the court that the defendant herein, the Missouri, Kansas & Texas Railway Company of Texas, is guilty of a violation of an Act of Congress known as an act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employees thereon. Approved March 4, 1907, as charged in counts Nos. 1, 2, 3, 4 and 5 in petition No. 32; and as charged in counts Nos. 1, 2, 3, 4 and 5, as charged in petition No. 34; and guilty as charged in counts Nos. 1, 2, 3, 4 and 5 in petition No. 35, and the court hereby assesses fines of fifty dollars, in each of the five counts, in causes Nos. 32, 34 and 35 as herein consolidated, aggregating the sum of seven hundred and fifty ($750.00) dollars, with interest at the rate of six per cent per annum, from the date of this judgment, and all costs of suit, for which let execution issue.

Satisfaction of Judgment in Cause No. 35.

Received of the Missouri, Kansas & Texas Railway Company of Texas the sum of $275.95 in full satisfaction of the judgment rendered in cause No. 35, at law, *The United States of America* v. *Missouri, Kansas & Texas Railway Company of Texas*, and all costs in said cause.

J. R. Blades,
Clerk.

Motion to Stay Execution and Extend Time.

In United States District Court for the Eastern District of Texas, at Sherman.

United States
vs.
M., K. & T. Ry. Co. of T.

Nos. 32-34-35.

Now comes defendant, the Missouri, Kansas & Texas Railway Company of Texas, and shows to the court that this court will adjourn today or tomorrow and that it will not be allowed time during the term in which to file a motion for new trial, or bill of exceptions, herein, if same should not be granted.

Wherefore, defendant prays that forty-two (42) days after the adjournment of this term of court be granted time in which to prepare and file motion for new trial and bill of exceptions.

HEAD, SMITH, HARE & HEAD,
Attorneys for Defendant.

Filed June 11, 1912.

J. R. Blades.
Clerk.

Order Granting Stay of Execution and Extending Time.

In the United States District Court for the Eastern District of Texas at Sherman.

United States
vs.
M., K. & T. Ry. Co. of T.

Nos. 32-34-35.

On this, the 11th day of June, 1912, came on to be heard the motion of the Missouri, Kansas & Texas Railway Company of Texas for forty-two (42) days after the adjournment of this term of the court in which to prepare and file motion for new trial and bill of exceptions, and the same being heard and understood by the court is granted, and it is ordered and adjudged by the court that the time within which the defendant in this cause may prepare and file the motion for new trial herein and bill of exceptions is extended to forty-two days after the adjournment of this court.

It is further ordered that execution be stayed upon the judgment rendered in said cause for said forty-two (42) days.

GORDON RUSSELL,
Judge.

Filed June 11, 1912.
J. R. Blades,
Clerk.
By M. B. Oslin,
Deputy.

BILL OF EXCEPTIONS.

In the District Court of the United States for the Eastern District of Texas, at Sherman.

United States
vs.
Missouri, Kansas & Texas Railway Company of Texas.
No. 32.

United States
vs.
Missouri, Kansas & Texas Railway Company of Texas.
No. 34.

United States
vs.
Missouri, Kansas & Texas Railway Company of Texas.
No. 35.

CONSOLIDATED.

No complaint is made of the judgment rendered in cause No. 35, the judgment in that cause has been paid off and satisfied, and so much of the record as pertains to that cause only, is not brought up with this writ of error.

On the trial of the above entitled and numbered causes, in the District Court of the United States for the Eastern District of Texas, sitting at Sherman, on May 29th and 30th, 1912, the following evidence was introduced, proceedings had and exceptions reserved, to-wit:

It was agreed that the Missouri, Kansas & Texas Railway Company of Texas is a corporation organized and doing business under the laws of the State of Texas; that it is a common carrier engaged in interstate com-

merce by railroad in the State of Texas. It is further agreed that the trainmen alleged in the three several cases tried were the trainmen in charge of the alleged trains, and that they commenced work at the times alleged in the petitions, and were finally released at the times alleged in the several petitions, and that during the time from the time called to the time released they were in the service, except as may be shown by proof offered. That all of said employes and trains were engaged in handling interstate traffic at the times alleged in the respective petitions. It is further understood that causes Nos. 32, 34 and 35 are tried together on these facts.

Plaintiff rests.

J. MUNDAY, a witness for the defendant, testified:

Am superintendent of the Missouri, Kansas & Texas Railway Company of Texas at Denison, and my jurisdiction covers the portions of the road from Dallas to Denison, Denison to Wichita Falls and the Bonham and Sherman Branches. Now have no jurisdiction south of Dallas, but did have such jurisdiction in November, 1911, and during that time was superintendent south to Hillsboro, which includes the line to Ft. Worth as well as the line to Dallas. As superintendent I had charge of the conductors and train crews in handling trains, had supervision over the operation of trains.

In suit No. 32, train No. 622, engine 562, Conductor Kyle, Engineer Stone was called to leave and left Dallas at 12:50 p. m. November 30, and arrived at Denison at 8:30 p. m., November 30. The train was de-

layed from 8:00 a. m. until 9:35 a. m. at West Yards, which is the yard near Greenville, and then again from 12:30 p. m. until 3:50 p. m. also at the West Yards. Eight hours and five minutes from Dallas to Denison was the schedule running time of this train from Dallas to Denison, Dallas being the initial point and Denison the terminal. I knew nothing on the morning that the train left Dallas to indicate that it would not reach Denison in 16 hours, and had no reason to expect they would go over the time.

Suit No. 34 charges that the crew of train No. 404, engine No. 102 left Ft. Worth at 6:15 p. m. November 11, and went off duty at 12:05 p. m. November 12. The running record of that train as shown by train sheet from Ft. Worth to Denison, and the delays it encountered are these: That train was called to leave Ft. Worth at 6:15 p. m. November 11, and left at that time, and arrived at Denison at 12:05 p. m. November 12, which would make 17 hours and 50 minutes. The sheet shows there was two hours delay between Potsboro and Denison. Pottsboro was situated 87-10 miles from Denison. There was a telegraph station at Ray between Pottsboro and Denison, and the train stopped at Ray. The regular schedule time of this train between Ft. Worth and Denison was seven hours and five minutes. At the time the train left Ft. Worth I knew nothing indicating that the train crew would not reach Denison in 16 hours. I was unaware of any circumstance indicating anything of the kind. The company regularly inspects its engines and keeps them in good repair as far as it reasonably can.

Cross Examination.

The only two delays I mentioned to the train crews involved in suit No. 32 were the two at West Yards; they were the most important delays. The train arrived at Garland at 3:30 a. m. and left at 3:40 a. m., arrived at Rockwall at 5:02 and left at 5:55, arrived at Royce City at 6:44 and left at 7:07, arrived at Caddo Mills at 7:32 and left at 7:34, arrived at Whitewright at 5:25 and left at 5:40, arrived at Bells at 6:05 and left at 6:57. Those are all the delays I am able to find in addition to what I have already shown. There may have been some delays at blind sidings that we have no figures for.

E. V. KYLE testified for defendant as follows:

November 30, 1911, I was a freight conductor for the defendant, and handled train No. 622, engine 562 between Dallas and Denison on that date. I kept a record of the delays I encountered on the road. I have no personal recollection of the delays I sustained, and would have to refresh my recollection by looking at my train book. I have the train book with me. My record shows that I was delayed 50 minutes at Rockwall doubling into that place. The engine would not handle the train up the hill and we had to double, and we also placed a car of merchandise on the house track. It was a very cold morning and we had a full load for the engine and a very frosty rail, and the engine slipped and was not able to start the train on the side of the hill, and we took half the train to Rockwall and came back and got the other half, and we had a car of merchandise to place on

the house track at Rockwall, and that and the delay doubling the hill amounted to fifty minutes in the aggregate. Could not say how much of the delay was caused by the frosty rail and the engine slipping down the hill and how much was caused by setting out the car of merchandise. I presume we consumed 35 or 40 minutes doubling the hill and the balance of the time setting out the car. The next delay was at Royce and there we met a passenger train and two extras and that probably delayed us 15 minutes, and we ran out of water there and made a run for water. After I returned I was delayed thirty minutes waiting for No. 6, the Flyer, and placing two cars of water at the oil mill, which was commercial work. The water placed at the mill was water we had in the train and delivered there. We ran to Greenville for water for the engine. We left the train at Royce and made the run to Greenville with the engine and got the water. Myself and the engineer and fireman went to Greenville for water. I left the brakemen with the train. Could not state positively what time we left Royce for Greenville. The brakemen had no duties to perform with reference to the train during the time we were going from Greenville to Royce for water and coming back. We left Greenville to go back to Royce at 9:35 a. m., and we got there about eight. During the hour and 35 minutes we were eating breakfast and waiting for the engine; I had nothing to do with the movement of the train and engine during that time. I was not with the engineer and fireman during that time and don't know what they did. The round-house force at the round-house at Green-

ville had charge of the engine during that time. I know they took charge of it. We arrived back at Royce at 10:30 a. m., but I have no record of the time of departure from Royce, and I have no record of the time of arrival back at Greenville. When we got back to Royce I found the brakemen in the caboose, but I don't remember what they were doing. My record shows we were at Greenville from 12:30 p. m. until 3:50 p. m. waiting for repairs on the engine. I can say that during that time I was not working and had nothing to do with the train. My record is silent about that, it does not say I did work or did not. I state as a fact I did not work during that time. I have no distinct recollection of what I was doing but I know I was not working. At Greenville all work in the yards is done by the switching crew. Cars were taken out and cars added to the train by the switch engine and its crew. We got the train back from the yard crew when the engine came back from the round-house. During the period of time we were at Greenville I could not say positively whether the engineer and fireman did any work in connection with the engine. The yard crew uses its own engine. That was the last delay I have until we reached Denison.

Cross Examination.

After leaving Greenville we made schedule running time. I could not say from the records or otherwise where we were on the trip when the 16 hours expired. I was probably along about Celeste about that time. I did not know the 16-hour law had expired on me; I did not pay any attention to it. Independent of the usual

custom and the records, I remember this was Thanksgiving Day. The first delay of any consequence on the trip was when we got out of water at Royce and had to send the engine to Greenville for water. We arrived at Royce at 6:50 and got back there from Greenville at 10:30. It must have been 11 o'clock when we left Royce finally, but I have no record of that. That delay is chargeable to the fact that we didn't have water enough to run the engine. I have no record of the time of the second arrival at Greenville. My engine and fireman and myself took the water car and engine and went to Greenville for water. The two brakemen stayed in the caboose waiting for us to come back. I did not know just what time we could get back and the brakemen did not know, and they stayed with the caboose and train waiting for us to come back. The first time we went to Greenville and made the trip for water as stated the engine went in on the dump track and I went to the lunch counter. The tank had to be filled with water and the fire in the engine cleaned. Do not know how long it would take to do that. The engineer and fireman got breakfast about as I did. They were waiting for the water and for the engine to come up, and then we were to go back to Royce. We went back to Royce and got the balance of the train and went on to Greenville again. I could not say that the engine broke down, but I have a record of repairs on the engine. The record shows we were delayed for repairs on the engine from 12:30 to 3:50. But for the records, I could not say positively that I was in Greenville on that day. When

we got to Greenville we just backed into the yard. I do not remember that I received a telegram releasing me from duty. I could state that I was not doing anything at the time we were in Greenville. We were waiting until the engine could be fixed so we could resume our duties. I did not know what time the engine would be completed and there was no way for me to tell. I was waiting there until the engine could be fixed and I could go on to Denison, an indefinite time. The same was true with reference to the other men as to whether they were on duty or not. We were all waiting there until that engine could be repaired at some indefinite time, we didn't know then, and as soon as the engine was repaired we expected to go on to Denison.

Re-Direct Examination.

After I got to Denison and turned my train loose, I waited there until they called me to go on another run, and during the interval was not working. There is a place in the caboose for the brakemen to sleep and they could have gone to sleep if they had wanted to. There were also facilities for them to get something to eat. After they got through the repairs on the engine at Greenville the engineer brought the engine back from the round-house. It was not necessary for me to be notified; I was in the office where I could see the engine. I had nothing to do during the time I was in Greenville. When the train left Dallas, I was expecting under my employment to take the train through to Denison, Denison being the terminal of that run. The employment was not finally completed until I arrived at Denison with

the train, my trip was not ended until I got to Denison. I had 15 loads and 21 empties in my train at Rockwall, being 37 cars, which was full tonnage for the engine. I suppose the engine could have handled ten per cent less tonnage on the hill at Rockwall without having to double the hill. My engine had a rating of 985 tons, and I had 949 tons on this occasion. I had no reason to anticipate that morning that I could not get through with my train. I believe November, 1911, was a very dry time, and we had trouble keeping water for the engines. There was no water station between Dallas and Greenville. Of course we had water stations but there was no water between Dallas and Greenville, and we carried a water car for the purpose of supplying the engine. Such an occurrence of having to run to a station for water was rather usual at that time.

Re-Cross Examination.

Q. You drew pay from the railroad company for 19 hours and 40 minutes on that trip, didn't you?

A. Yes, sir.

When the above question was propounded to the witness the defendant objected to the same because the testimony sought to be elicited thereby would be immaterial and irrelevant, and the matter depends on the contract with the employes, and has no reference to the number of hours they work. These objections were overruled by the court and the witness was permitted to testify as above indicated. The defendant excepted to the action of the court and still excepts and in this behalf tenders its bill of exception.

The regular schedule of the train was 7 hours and 5 minutes, and upon the occasion in question we made the trip in 19 hours and 40 minutes.

Re-Direct Examination.

We are paid for the hours we are out on the road between terminals, and this is true whether we are released on the road or not. If we are on the road from Dallas to Denison 12 hours, and are released at Greenville for five hours, we are paid for the five hours. That is in the conductor's contract with the railroad.

At this stage, and in view of the testimony just detailed, the defendant moved the court to exclude from the consideration of the jury the statement of the witness that he was paid for 19 hours and 40 minutes work. The court overruled the motion, to which action of the court defendant then and there excepted and still excepts and in this behalf tenders its bill of exception.

H. T. BRYSON, a witness for the defendant, testified:

I am an engineer in the employment of the defendant and was so engaged in November, 1911. On that date I made a run from Ft. Worth to Denison on train No. 404, engine 102, beginning November 11 at 6:15 P. M. and ending November 12, 1911. The initial point of that train was Ft. Worth and the terminal point Denison. The condition of the engine when we left Ft. Worth was good, and I had no trouble with it until I left Pottsboro, which is 8.7 miles from Denison. I there had trouble with the injectors. The one on the left would not work at all, and the one on the right would

only work when the engine was standing still. The injector would not take up the water, and I had to stop, as an engine cannot be run without water in the boiler. When I left Pottsboro I had 18 minutes in which to reach Denison within the 16 hours. My intention was to go to Ray and head in at Ray and I had plenty of time to do that. I know I did not have a full train; the train was a light one. At Ray the train would have been taken in charge by the yard crew. There would be a switch engine standing on the main line, and when I stopped he would couple on to me. They take the train and put it away. I do not know how much I was delayed on account of the injector; I would not let them move me for some time because I had no water and did not think it was safe to move. I let the engine stand still until I got it full of water, and then he proceeded to town with the engine. I have run on the main line from Dallas to Denison, and made such run in November, 1911, but the date I could not state. I know how trains were handled in the yards at Greenville. If anything has to be done to the engine at Greenville, the brakeman would cut the engine loose from the train and the engineer take it to the dump track, and after it was put on the dump track the engineer would have nothing more to do with it at all and would not go back to the engine unless the call boy told him what time he was going out. If he did not, I would go to the restaurant and stay until he came after me. If I carried the engine in at 12:30 P. M. and it was not ready to go out until 3:50 P. M., I would have nothing to do with the en-

gine during that time. I would not go around to the round-house. I would go to the restaurant and stay there until the call boy came after me to notify me that the engine was ready. That was the general custom of all the engineers and firemen there. They had a yard crew there, and they would be in charge of the engine during that time. The hostler would have charge of the engine. The hostler is an employe at the round-house and does not run on the road at all.

Cross Examination.

I am working for the defendant now as an engineer. I had no trouble with the right injector until I got to Pottsboro. I tried the left one at Pottsboro. You never work it unless you go to mix up compound. We can not leave without both injectors in proper order. Both injectors were out of fix. I had to stop to get the engine hot between Pottsboro and Denison. That was not before I got to Pottsboro. I remember this trip because it was a hard one. I remember the trip. 759 is Ft. Worth. We were not delayed there thirty minutes on account of the air on the engine that I remember, there was nothing wrong with the engine. If the conductor's record shows that, I would not undertake to state it was not a fact, but I know if there had been anything wrong with the engine I would have had some one to fix it, and I know there was no one fixed the engine. I do not remember the numbers of the stations. It is always the rule at Whitesboro to eat, and we ate breakfast at Whitesboro. There was no delay there on ac-

count of getting the engine hot. I don't know what the conductor's report shows, for I have never seen it. I don't remember being delayed there blowing up. I could not get one of the injectors to prime at Whitesboro. That was the fault of the injector, and it had to be repaired before it could be used again. I did not repair it on the trip. The other injector, the right one, was working pretty fair, nothing extra. It gave out between Pottsboro and Ray. There is no station between Pottsboro and Ray. The steam got down low. The injector was out of fix before that, and it was the fault of the injector. I did not fix the injector. I went on into Denison. The switch engine turned my train over to the round-house people. I made a report at the round-house coming into Denison on this trip. I reported that the right injector would not work and the left one would not take up the water. The paper you show me is my report on that occasion. I don't find anything in it about the injectors. That report is in my writing. When I come in I report at the round-house anything that may be wrong with my engine. I overlooked reporting the engine injectors out of fix. It is necessary for the injectors to be all right to run the engine. Whether an injector gets out of fix depends on the water. If you have good water, injectors are not apt to get out of fix. If you have muddy water and have to use a compound, they are bad, the compound causing them to corrode. With any and all water it is an ordinary occurrence for an injector to get out of fix. I could not remember the number of times I have made the trip from Dallas to

Denison by Greenville. I was in Greenville and through there in November, 1911, but I could not without my book say how many trips I made, and my book is not here. I do not know what time I got to Ray. I do not keep a record of the delays, the conductor does that. His book will show. I stayed on my engine when the switch engine took hold of us. My engine was not dead at that time; I went on with the engine; I never got off it until I got to the dump. The engine dump is where the engines are turned over and the fires cleaned. I surrendered it there to the round-house people and made my report after it was turned over. Under the rules of the company we have to make a report, but we register in at the time we arrive on the dump. I have to make a report before I leave the round-house.

Re-Direct Examination.

When I got to the round-house I went to Mr. Corbett, the general foreman, and said, "Mr. Corbett, you ought to do something with the engine, the left injector will not work at all, and the right one will not take up the water in running," and he says, "You must be a good one to run the engine from Ft. Worth here without putting any water in the boiler." It is necessary that the enjectors be put in working order before the engine will steam, and I said in my report that the engine would not steam. My injectors would not work after I passed Pottsboro, and in order to get water in the engine I had to stop, and when I got the water in I would have no steam and I would then have to get steam enough to

proceed. I would have to fire up until the water would make steam and then go as far as I could until that water gave out and stop and get in some more. My engine did not go from Ray to the round-house by its own steam, but was hauled in by the switch engine. In November, 1911, the water on the Ft. Worth Division was bad. We were using water from Whitesboro and that was artesian water, and then we got water out of the creek that was very good, but when we mixed it, it would foam and we used the compound. The compound is a chemical used to soften the water. They claim the artesian water foams because there is alkali and soda in it. We used the compound with the bad, muddy water. We took water at Gravel Pit and that was creek water, and at Mingo and that was creek water and muddy, and then I got artesian water at Whitesboro, and that was the only good water I had and mixing it with the muddy water caused it to foam. There was not a great abundance of water in this country last November. I think all the water tanks between here and Ft. Worth were supplied with water. I examined the injectors and the engine before leaving Ft. Worth. I tried both injectors and their condition was good, both of them worked. That is the rule of every engineer before he starts on a trip.

Re-Cross Examination.

I examined the injectors after I got into Denison. The rule required me to make a report to the round-house people as to the condition of the engine, they require me to put it on the book. I thought I put on the book the condition of the injectors. I think Mr. Cor-

bett is round-house foreman at Denison yet. I did not tell Mr. Corbett where the injector stopped, and he said, I must have been a mighty good man to bring the engine from Ft. Worth to Denison. I said the right one would not work while the engine was runing and he made that remark. He said Ft. Worth because that was where I started from. The water had been in bad condition for a good while. The condition of the water at this time caused me to have to use compound on that trip. The muddy water ruined the injectors. I knew when I left Ft. Worth that I would use muddy water and the compound. The injectors have a whole lot to do with the steaming of an engine. In some cases an engine will refuse to steam when the injectors are all right. The fact that I reported to the round-house people that the engine would not steam did not indicate that there was anything on earth the matter with the injectors.

Re-Direct Examination.

Corbett had supervision of the repairs to be made on engine, and I told him about the injectors. After the switch engine came I stayed on my engine because it was in bad shape, and I did not want to leave it until it got on the dump. I thought the crown-sheet might be damaged on account of the lack of water, and I did not know how long it would be until they got her on the dump. I remained with the engine and watched it. I do not know where the other members of my crew were. The fireman stayed on the engine and rode up to some street there in Denison and got off and went home. I don't know what went with the others. The

injectors are not very apt to get out of fix with good water. With such water as we had in November, 1911 it was a common, every-day occurrence for the injectors to get out of fix.

Re-Cross Examination.

As engineer I have to stay on the engine until it gets to the dump. The fireman got off about two blocks from the round-house. The train was on the dump about 30 minutes after the fireman got off. They had to cut the engine off the train and back it into the dump

J. MUNDY, being recalled by defendant, testified:

During November of last year we did not have good water for railroad purposes. It did not rain enough was the principal reason. We had trouble in getting as much water as we needed; we had a good deal of trouble in getting enough water to operate the road, as everybody knows, and we had to use most any kind of water we could get, anything that would boil. We would have gotten better water for the service if we could have done so. The scarcity of water was a general condition that prevailed in this country at that time.

Charge (Delivered Verbally).

Gentlemen of the Jury:

You have been engaged in the trial of three cases, which by consent of counsel for the Government and counsel for the defendant, are heard in one trial. The three cases are the *United States* v. *Missouri, Kansas & Texas Railway Company of Texas*, No. 32; *United States*

v. *Missouri, Kansas & Texas Railway Company of Texas*, No. 34; and *United States* v. *Missouri, Kansas & Texas Railway Company of Texas*, No. 35. This agreement of counsel is made in order to save the time of the court and the jury, and because the issues in the cases can be as clearly presented and understood in one trial as in three trials. Had there been three trials, the second would have been largely a repetition of the first, and the third a repetition of the other two.

It was also agreed between counsel on either side of these three cases that the Missouri, Kansas & Texas Railway Company of Texas, on the occasions charged by the Government, was engaged in the movement of trains through its employes, and that it and its employes were subject to the provisions of the Act of March 4, 1907, known as "An Act to Promote the Safety of Employes and Travelers upon Railroads by Limiting the Hours of Service of Employes thereon."

The agreements between counsel in the cases practically make it a matter of law for me to direct the jury peremptorily, and either direct you to find a verdict of guilty against the defendant in all the counts in each of the three cases, or to find a verdict in favor of the defendant in some one of the cases or a verdict in favor of the defendant in all of the cases.

Under the construction which the court thinks is correct as to the law under which these suits have been brought by the Government, the railroad company is liable for the penalties imposed by the terms of the statute, unless the excuses which they offer for failing to release

the train crews in sixteen hours are valid excuses under the law.

The Act provides, "That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or to the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employe at the time said employe left a terminal, and which could not have been foreseen." In order for the company to escape liability under the Act, the reasons for the delay must be such as fall within the terms of the proviso I have just read.

The first reason suggested is that one of the trains was delayed 53 minutes at a hill near Rockwall. It is claimed that the train was proceeding over that portion of the road on the morning of the delay, and on account of the number of cars in the train, and the fact that there was frost on the rail, it became necessary to cut the train in two and take a part of it to Rockwall and come back for the balance. I inquired of the conductor who made the statement as to this state of facts as to how many cars he had in the train and he stated the number of cars the train contained. The court does not recollect exactly the number he stated, but it was quite a large train. He stated the number of empties and the number of loads. I then inquired of him if the train might not have been carried over the hill without having to double, as the technical expression is, with fewer cars in the train, and he said it could, and that about a ten per cent. reduction in the tonnage of the train would

have enabled the engine to go over the hill and avoided the necessity of doubling back.

Another excuse offered by the company is that they were delayed at different points along the line in order to meet trains going in the opposite direction from which they were traveling. Now, I don't think this excuse falls within the proviso attached to the act. I do not believe it is an excuse which would exempt the company from liability to pay the penalty.

Another excuse offered is that the train was delayed three hours in order to go from Royce City to Greenville for water, and it was stated that there had been in this country a very great scarcity of water for quite a while, and it appears that the only water station at which the supply could be replenished after leaving Dallas was Greenville. The defendant company knew that fact, knew there was no water at Royce City, and that the engine could not procure water anywhere after leaving Dallas until it reached Greenville, and, therefore, if one water car was not sufficient, they should have attached two or whatever number was necessary to supply the engine until it reached Greenville, and I don't think that excuse falls within the proviso attached to the act.

I believe this disposes of all the reasons suggested why the defendant should be acquitted in these cases, except two. One of those excuses is that there was a delay of three hours and twenty minutes at Greenville, I believe is the time testified to, in order to allow the necessary repairs to be made on the engine that was pulling the train operated at that time. The facts testified to in

reference to this matter do not call for me to decide here whether, if the crew had been dismissed for a specific length of time, say for the length of time they were delayed there, three hours and twenty minutes, it would be the duty of the court to deduct that from the computation of time necessary to make the sixteen hours, and recognize that delay as one of the valid excuses allowed in the proviso I have read. It is not necessary to decide that because the evidence does not show that the crew was released. It is true that they were not engaged in the actual work of moving the train for a period of time there amounting to three hours and twenty minutes, but the crew did not know whether that leisure would last thirty minutes or three hours, but it just happened to last three hours and twenty minutes. In answer to a question asked one of the witnesses, he stated in substance that they left Dallas with the train with the understanding that it was their duty to take it to Denison, and that none of the delays which happened along the route relieved them from taking it there. They might not have been engaged all the while in the actual operation of the train, yet the duty to take it to Denison never left them. Therefore, I think within the fair intendment of the law they were on duty, though not engaged in actual work. They were liable to be called upon to engage in the work at any time, and when that time would be they had no manner of determining.

The other reason suggested was the fact that a defective injector prevented them from coming into Denison from Pottsboro. The engineer who testified as to

the condition of the injector stated that when he reached Pottsboro, he had eighteen minutes in which to make Denison, and I believe the distance is 8 7-10 miles, and could have made it but for the defect in the injector. On cross examination, this witness testified that the condition of the injector was brought about by the fact that the scarcity of water forced the company to use inferior water, and that they were compelled, when it was mixed with artesian water, to use a compound, and that this compound itself, while it largely lessened the foaming of the water in the boiler, had a tendency to corrode the injector. That is a matter that could have been foreseen by the exercise of reasonable care.

I have taken occasion to advert to these matters in order that counsel may have the benefit of the views entertained by the court as to each separate defense set up in the pleadings and raised by the proof, so that, if the case should go up, there will be no obscurity about the view taken by the court.

Having said this much, I now direct the jury to return a verdict on each of the counts in each of the three cases against the defendant, and the District Attorney may prepare the verdict.

At the conclusion of the evidence and before the court had delivered the main charge to the jury, defendant requested the court to give the jury the following instructions, in their order.

1. In this case you are instructed to return a verdict for the defendant.

2. In case you find the defendant has violated the statute in any of the counts of the government's petition you will assess against it a penalty not to exceed five hundred ($500.00) dollars for each and every violation, and state the amount so assessed in your verdict.

And the court refused to give said charges, or either of them, to which action of the court in the refusal to give each of said requested charges defendant then and there excepted.

At the conclusion of the delivery of the main charge to the jury, and before the jury had retired defendant excepted to the charge of the court given on the ground that the court did not submit to the jury the question of fixing the amount of the penalty, and tenders this its bill of exceptions.

A. H. McKNIGHT, and
HEAD, SMITH, HARE & HEAD,
Attorneys for Defendant, The Missouri, Kansas & Texas Railway Company of Texas.

We hereby agree that the foregoing is a true and correct bill of exceptions concerning all matters that occurred in the trial of consolidated causes Nos. 32 and 34, the judgment in cause No. 35 having been satisfied, and that the same contains all of the evidence introduced in the trial of said causes, and the full charge of the court given to the jury pertaining to said causes, and that the same shall be approved by the court without other or further notice.

J. B. DAILEY,
Asst. U. S. Attorney for Plaintiff, The United States of America.

Approved, allowed and made a part of the record herein on this 11th day of July, A. D. 1912.

GORDON RUSSELL, *Judge.*

Filed July 11th, 1912. J. B. Blades, Clerk.

Petition for Writ of Error.

In the District Court of the United States for the Eastern District of Texas, at Sherman.

United States of America,
vs.
Missouri, Kansas & Texas Railway Company of Texas.

Nos. 32 and 34.

To the Honorable Gordon Russell, Judge of said District Court of the United States for the Eastern District of Texas.

The Missouri, Kansas & Texas Railway Company of Texas, defendant in the above entitled causes, feeling that it is aggrieved by the verdict of the jury, and the judgment entered on the 29th day of May, A. D., 1912, comes now by A. H. McKnight and Head, Smith, Hare & Head, its attorneys, and petitions said court for an order allowing said defendant to present a writ of error to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of said security all further proceedings in these causes shall be suspended and stayed until the determination of said

writ of error by the United States Circuit Court of Appeals for the Fifth Circuit, and your petitioner will ever pray.

A. H. McKnight,
Head, Smith, Hare & Head,
Attorneys for Defendant, Missouri, Kansas & Texas Railway Company of Texas.

Writ of error allowed in said causes this 11th day of July, A. D. 1912.

Gordon Russell, *Judge.*

Order Allowing Writ of Error.

In the District Court of the United States for the Eastern District of Texas, at Sherman.

United States of America,
vs.
Missouri, Kansas & Texas Railway Company of Texas.

Nos. 32 and 34.

The defendant, the Missouri, Kansas & Texas Railway Company of Texas, having this day filed its petition for writ of error from the decision and judgment thereon made and entered herein to the United States Circuit Court of Appeals for the Fifth Circuit, together with an assignment of errors, within due time, and also prays that an order be made fixing the amount of security which defendant should give and furnish upon said writ of error, and that upon the giving of said security all other proceedings in this court be suspended and stayed until the determination of said writ of error by said Circuit Court of Appeals for the Fifth Circuit, and said petition having this day been duly allowed.

Now, therefore, it is ordered that upon the said defendant, the Missouri, Kansas & Texas Railway Company of Texas, filing with the clerk of this court a good and sufficient bond in the sum of twelve hundred ($1,200.00) dollars to the effect that if the said defendant, the Missouri, Kansas & Texas Railway Company of Texas, the plaintiff in error, shall prosecute said writ of error to effect and answer all damages and costs if it fails to make its plea good, then the said obligation to be void else to remain in full force and virtue, the said bond to be approved by the court. That all further proceedings in this court be, and they are hereby suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Fifth Circuit.

Dated this 11th day of July, A. D., 1912.

GORDON RUSSELL, *Judge.*

Filed July 11th, A. D. 1912. J. R. Blades, Clerk.

Supersedeas Bond.

In the District Court of the United States for the Eastern District of Texas, at Sherman.

United States of America,

vs.

Missouri, Kansas & Texas Railway Company of Texas.

Nos. 32 and 34.

KNOW ALL MEN BY THESE PRESENTS,

That we, the Missouri, Kansas & Texas Railway Company of Texas, a corporation duly incorporated, as principal, and American Surety Company of New York, a

corporation duly incorporated, as surety, are held and firmly bound unto the United States of America in the sum of Twelve Hundred ($1,200.00) Dollars lawful money of the United States of America, to the payment of which well and truly to be made the said principal and the said surety bind themselves, and each of their successors and assigns jointly and severally firmly by these presents.

Sealed with our seals, and dated this 11th day of July, A. D. 1912.

WHEREAS, the above named defendant, the Missouri, Kansas & Texas Railway Company of Texas, has sued out a writ of error to the United States Circuit Court of Appeals for the Fifth Circuit to reverse the judgment in the above entitled causes of the District Court of the United States for the Eastern District of Texas.

Now, therefore, the condition of this obligation is such that the above named Missouri, Kansas & Texas Railway Company of Texas shall prosecute said writ to effect and answer all costs and damages if it fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

Missouri, Kansas & Texas Railway
Company of Texas.

By A. H. McKNIGHT,
HEAD, SMITH, HARE & HEAD,
Attorneys.

American Surety Company
of New York.

By R. G. HALL,
Resident Vice-Prest.

Approved this 11th day of July, A. D. 1912.

GORDON RUSSELL,

Judge.

Filed July 11th, A. D. 1912. J. R. Blades, Clerk.

Assignment of Errors.

In the District Court of the United States for the Eastern District of Texas, at Sherman.

United States of America,

vs.

Missouri, Kansas & Texas Railway Company of Texas.

Nos. 32 and 34.

Comes now the defendant, the Missouri, Kansas & Texas Railway Company of Texas, and files the following assignments of error, upon which it will rely in the prosecution of the writ of error in the above entitled causes, and says that the District Court of the United States for the Eastern District of Texas erred in the following particulars:

I.

The District Court erred in overruling defendant's second special exception to plaintiff's petitions, which is as follows:

Defendant specially excepts to plaintiff's petition, and says, that the Act of Congress on which it is based is invalid, because Congress has no power to prescribe the hours of service of employes engaged in interstate commerce, except insofar as it may do so by virtue of the commerce clause of the Federal Constitution, and that

this act is not a regulation of interstate commerce within the meaning of that clause.

II.

The District Court erred in overruling defendant's third special exception to plaintiff's petition, which is as follows:

Defendant specially excepts to plaintiff's original petition, and says that the act upon which it is based is void, because its provisions are arbitrary and unreasonable, and there is no just basis for the classification made in said act, the act applying alone to common carriers by railroad, and therefore it deprives the railroad companies of their property without due process of law, contrary to the fifth amendment to the Constitution of the United States.

III.

The District Court erred in overruling defendant's fourth special exception to plaintiff's petition, which is as follows:

Defendant specially excepts to plaintiff's original petition, and says that said petition is defective, in that the same does not negative the exception contained in the proviso 2, section 3, of the act on which it is based.

IV.

The District Court erred in overruling defendant's fifth special exception to plaintiff's petition, which is as follows:

Defendant specially excepts to plaintiff's original petition, and says that it appears from said petition that

the five penalties sought to be recovered in this case grow out of one act, in violation of the act on which the cause of action is based, and it appears from said petition that the five several employes named in the five several counts in said petition were employes on, and engaged in operating one and the same train and that the operation of said train constituted but one act on the part of this defendant, and if liable, that defendant is liable for only one penalty for an act in said petition alleged.

V.

The District Court erred in admitting, over the objection of defendant, the testimony of the witness, E. V. Kyle, that he drew pay from defendant for nineteen hours and forty minutes on the trip involved in cause No. 32, because said testimony was immaterial, irrelevant and a matter that depended on the contract between defendant and its employes, and had no reference to the number of hours they worked.

VI.

The District Court erred in refusing defendant's requested instruction No. 1, which is as follows:

1. In this case you are instructed to return a verdict for the defendant.

VII.

The District Court erred in refusing defendant's requested instruction No. 2, which is as follows:

2. In case you find the defendant has violated the statute in any of the counts of the Government's petition you will assess against it a penalty not to exceed Five Hundred ($500.00) Dollars for each and every violation, and state the amount so assessed in your verdict.

VIII.

The District Court erred in the main charge to the jury in not submitting to the jury the question of fixing the amount of the penalty, if any should have been assessed against the defendant.

WHEREFORE the said Missouri, Kansas & Texas Railway Company of Texas, plaintiff in error, prays that the judgment of the District Court of the United States for the Eastern District of Texas be reversed, and that said District Court be directed to grant it a new trial of said causes.

A. H. McKNIGHT,
HEAD, SMITH, HARE & HEAD,
Attorneys for Plaintiff in Error, Defendant in the Lower Court, Missouri, Kansas & Texas Railway Company of Texas.

Filed July 11th, A. D. 1912. J. R. Blades, Clerk.

Clerk's Certificate.

I, J. R. Blades, Clerk of the District Court of the United States for the Eastern District of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, bill of excep-

tions, assignment of errors and all the proceedings in consolidated cases Nos. 32 and 34 at law, wherein the United States of America is plaintiff and the Missouri, Kansas & Texas Railway Company of Texas is defendant, as fully as the same remains on file and record in my office at Sherman, Texas; that I received this writ on the 11th day of July, 1912, and that on this 15th day of ....July....., A. D. 1912, I have transmitted to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, through Messrs. Head, Smith, Hare & Head, attorneys of record for plaintiff in error, a true copy of the record and proceedings in the within named cases duly certified under my hand and seal.

Witness my hand and seal of said court at my office in the City of Sherman, Texas, the day and date last above named.

(Signed) J. R. Blades
Clerk.

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That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the minutes of November 19th, 1912.

Missouri, Kansas & Texas Railway Company
versus No. 2402.
United States of America.

On this day this cause was regularly called, and, after argument by A. H. McKnight, Esq., for plaintiff in error, and Phillip J. Doherty, Esq., special assistant United States attorney, for defendant in error, was submitted to the court.

Opinion of the Court.

Filed December 10th, 1912.

United States Circuit Court of Appeals,
Fifth Circuit.

Missouri, Kansas & Texas Railway Co.,
v. No. 2402.
The United States.

Error to the United States District Court, Eastern District of Texas.

Before Pardee and Shelby, Circuit Judges, and Foster, District Judge.

By the Court: In the transcript of this case we find none of the assignments of error well taken, and the judgment of the District Court is affirmed.

Judgment.

Extract from the Minutes of December 10th, 1912.

Missouri, Kansas & Texas Railway Co.,
versus No. 2402.
United States of America.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause, be, and the same is hereby affirmed.

It is further ordered and adjudged that the plaintiff in error, Missouri, Kansas & Texas Railway Company of Texas, and the surety on the writ of error bond herein, American Surety Company of New York, be condemned, in solido, to pay the costs of this cause in this court, for which execution may be issued out of said District Court.

Clerk's Certificate.

UNITED STATES OF AMERICA.
United States Circuit Court of Appeals,
Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from .... to .... next preceding this certificate contain full, true and complete

copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said court, numbered 2402, wherein Missouri, Kansas & Texas Railway Company is plaintiff in error, and United States of America is defendant in error, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 55 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 10th day of January, A. D. 1913.

(Signed) Frank H. Mortimer

Clerk of the United States Circuit Court of Appeals.

e)

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Missouri, Kansas & Texas Railway Company is plaintiff in error, and The United States of America is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Texas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 10th day of March, in the year of our Lord one thousand nine hundred and thirteen.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 23,517. Supreme Court of the United States. No. 942. October Term, 1912. Missouri, Kansas & Texas Ry. Co. of Texas et al. vs. The United States. Writ of Certiorari. 2402. U. S. Circuit Court of Appeals. Filed Mar. 26, 1913. Frank H. Mortimer, Clerk.

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2402.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
versus
THE UNITED STATES OF AMERICA, Defendant in Error.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the foregoing writ of certiorari, I now hereby certify that on the 17th day of April, A. D. 1913, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:

"In Supreme Court of United States, October Term, 1912.

No. 942.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS et al., Petitioners,
versus
THE UNITED STATES OF AMERICA, Respondent.

On Certiorari to the Circuit Court of Appeals for the Fifth Circuit.

It is hereby stipulated and agreed by and between counsel for the parties to the above cause, that the transcript of the record in said cause, filed in the Supreme Court with the application for certiorari, may be taken as a return to the writ of certiorari, and no new transcript made.

Witness our hands, this, the 7th day of April, A. D. 1913.

(Signed) ALEX S. COKE,
(Signed) A. H. McKNIGHT,
(Signed) HEAD, SMITH, HARE, MAXEY & HEAD,
(Signed) CECIL H. SMITH,
Attorneys for Petitioners.
(Signed) J. C. McREYNOLDS,
Attorney General.
(H.)"

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 17th day of April, A. D. 1913.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK HASTINGS MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

[Endorsed:] 942/23,517. No. 2402. United States Circuit Court of Appeals for the Fifth Circuit. Missouri, Kansas & Texas Railway Company, Plaintiff in Error, vs. The United States of America, Defendant in Error. Return to Writ of Certiorari.

[Endorsed:] File No. 23,517. Supreme Court U. S. October Term, 1912. Term No. 942. Missouri, Kansas & Texas Railway Company et al., Petitioners, vs. The United States. Writ of Certiorari and Return. Filed April 21, 1913.

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No. 942

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JAMES H. McKEN

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, AND THE AMERICAN SURETY COMPANY OF NEW YORK, PETITIONERS,

VS.

THE UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR CERTIORARI AND BRIEF FOR PETITIONERS.

ALEXANDER S. COKE,
A. H. McKNIGHT,
HEAD, SMITH, HARE & HEAD,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, AND THE AMERICAN SURETY COMPANY OF NEW YORK, PETITIONERS,

VS.

THE UNITED STATES OF AMERICA, RESPONDENT.

Petition for writ of certiorari requiring the Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court, for its review and determination, the case of the Missouri, Kansas & Texas Railway Company of Texas, plaintiff in Error, vs. The United States of America, defendant in error, No. 2402, in that court.

To the Honorable, the Supreme Court of the United States:

The petitioners, The Missouri, Kansas & Texas Railway Company of Texas and the American Surety Company of New York, respectfully show to this honorable court as follows:

I.

On February 1, 1912, in the District Court of the United States for the Eastern District of Texas, at Sherman, Texas, respondent, the United States of America, filed two suits for penalties, which said suits were Nos. 32 and 34 in said court, which said suits were consolidated and tried together.

In suit No. 32 petitioner, The Missouri, Kansas & Texas Railway Company of Texas, is charged with five violations of the act of Congress, known as "An Act to Promote the Safety of Employes and Travelers Upon Railroads by Limiting the Hours of Service of Employes Thereon" approved March 4, 1907, in this: That the engineer, fireman, conductor and two brakemen in charge of train No. 622 of petitioner, the Missouri, Kansas & Texas Railway Company of Texas, were kept in service from 12:50 A. M. on November 30, 1911, to 8:30 P. M. on the same day, and a cause of action is based on each employe in charge of said train so kept in service, and a penalty of Five Hundred ($500.00) Dollars is sought to be recovered on each employe so kept in service, or aggregate penalties in the sum of Twenty Five Hundred (2,500.00) Dollars (Rec. 2-7).

In cause No. 34, petitioner, The Missouri, Kansas & Texas Railway Company of Texas, is charged with a violation of the same statute by keeping the five employes in charge of its train No. 404, in service from 6:15 P. M. on November 11, 1911, to 12:05 P. M. on November 12, 1911. A distinct violation is charged for each of said employes so kept in service and a penalty

of Five Hundred ($500.00) Dollars is prayed for for each of said employes so kept in service, or aggregate penalties of Twenty-Five Hundred ($2,500.00) Dollars (Rec. 8-13).

The petitioner, The America Surety Company of New York, was surety on the petitioner, railroad company's supersedeas bond on error to the District Court, and the word "petitioner" hereinafter used will have reference to the railroad company alone, unless the context clearly shows otherwise.

II.

In reply to said charges petitioner, The Missouri, Kansas & Texas Railroad Company of Texas, excepted to the petitions of respondent on the ground that it appears from each of said petitions that there was but one violation of the Act of Congress in each case, if any and that it appears from said petitions that the five several employes named in the five several counts in said respective petitions were employes on and engaged in operating one and the same train and that the operation of each of said trains constituted but one act on the part of said petitioner, and if liable the said petitioner was liable for only one penalty for the act in each of said petitions alleged; and in addition thereto plead a general denial, and for special answer that if the employes were required to labor, as alleged, that the labor and work by them was due to unavoidable accidents, and the cause of the delays was unknown to said petitioner or its officers or agents in charge of said employes at the time said

employes left the terminal, and could not have been foreseen by said petitioner, its officers or agents in charge of said employes (Rec. 14-18).

III.

On May 29, 1912, the said special exceptions to respondent's original petitions were heard and overruled and said petitioner reserved exceptions (Rec. 19).

IV.

On May 30, 1912, the causes were tried before a jury and the following facts were proven:

It was agreed that petitioner, The Missouri, Kansas & Texas Railway Company of Texas, was a common carrier, engaged in interstate commerce by railroad in the State of Texas; that said trains and employes were engaged in handling interstate traffic at the times alleged in the respective petitions; that the trainmen, alleged in the several causes tried, were the trainmen in charge of the alleged trains; that they commenced work at the times alleged in the petitions, and were finally released at the times alleged in the several petitions, and that during the time from the time called to the time released they were in the service with the following exceptions (Rec. 24-5).

The undisputed evidence showed that the train involved in suit No. 32 left Dallas, Texas, to go by the way of Royse City and Greenville to Denison, Texas, a distance of 106 miles; that the schedule running time of said

train between said points was 8 hours and 5 minutes. (Rec. 25-6). When the train reached Royse City the engine was detached and run to Greenville for water; the brakeman on that train remained at Royse City while the other members of the crew went with the engine: The brakeman had no duty to perform in connection with the movement of the train until the engine returned, a space of 3 hours. At Greenville the engine was turned over to the yard force and the conductor, engineer and fireman were entirely relieved of its custody, and had no duty to perform in connection with its movement for 1 hour and 35 minutes. When the engine was delivered to them they returned to Royse City, got the train and went back to Greenville where the train was delivered to the yard crew, who had it in charge for 3 hours and 20 minutes. During this time the train crew were in no wise responsible for the train, and no member thereof had any duty whatever to perform in connection with it. The conductor did not know when he left Royse City how long it would be before he would return nor was either period of relief at Greenville for any definite time. In other words, the train crew did not know, when they surrendered possession of their train to the yard crew how long it would be before they would get it back. They utilized this period of waiting as they thought best; the time was at their disposal (Rec. 27-33). They were paid for this time, but that is a matter of contract. Their pay did not depend upon the time on duty (Rec. 33).

The train involved in suit No. 34 left Ft. Worth by the way of Whitesboro and Pottsboro for Denison, Texas,

a distance of 96 miles; the schedule running time of said train between those points was 7 hours and 5 minutes. The delay was caused by the failure of an injector on the locomotive. Both injectors were tested before the train left Ft. Worth and found to be in good condition. (Rec. 33). Owing to the continued drouth there was a scarcity of water and the railroad company was unable to get pure water; it had to use "anything that would boil," but it got the best water it could (Rec. 40). This impure water foamed, which made it necessary to use a compound. The engineer upon this occasion used the left injector to mix the compound and the right to water the engine. The left injector failed at or near Whitesboro; the right injector failed just after leaving Pottsboro, a station about 8 miles from Denison. But for this last failure the crew would have made the terminal within the 16 hour period (Rec. 33-40). The railroad regularly inspected its engines and there was nothing indicating that the crew would be required to work over time when they left Ft. Worth (Rec. 26).

There was nothing knowing to the Superintendent, who was the officer of petitioner, in charge of these employes at the time the crews left the terminals, indicating that either crew would not reach its destination well within the 16 hours. He had no reason to expect that they would go over the time (Rec. 26).

V.

At the conclusion of the evidence petitioner requested the court to instruct the jury as follows:

"In this case you are instructed to return a verdict for the defendant" (Rec. 45).

Which charge was refused by the court, and petitioner then and there excepted.

Thereafter the petitioner requested the court to instruct the jury as follows:

"In case you find the defendant has violated the statute in any of the counts of the Government's petition you will assess against it a penalty not to exceed Five Hundred ($500.00) Dollars for each and every violation, and state the amount so assessed in your verdict" (Rec. 46).

Which charge was refused by the court, and petitioner then and there excepted.

The court then instructed the jury to return a verdict on each of the counts, in each of the cases against petitioner (Rec. 40-5).

At the conclusion of the delivery of the main charge to the jury, and before the jury had retired, petitioner excepted to the charge given on the ground that the court did not submit to the jury the question of fixing the amount of the penalty (Rec. 46).

VI.

In accordance with the instructions of the court the jury returned a verdict against petitioner on each count in each case, and the court assessed a fine of Fifty ($50.-00) Dollars in each count against it, or Two Hundred and Fifty ($250.00) Dollars in each case (Rec. 20-21).

VII.

On July 11, 1912, petitioner filed in the District Court its approved bill of exceptions, assigned error, filed its approved supersedeas bond with the American Surety Company of New York as its surety, sued out writ of error and removed the cause to the United States Circuit Court of Appeals for the Fifth Circuit.

VIII.

The assignments of error presented and urged in the Circuit Court of Appeals were the following.

First Assignment of Error.

The District Court erred in overruling defendant's fifth special exception to plaintiff's petitions, which is as follows:

Defendant specially excepts to plaintiff's original petition and says that it appears from said petition that the five penalties sought to be recovered in this case grew out of one act, in violation of the act on which the cause of action is based, and it appears from said petition that the five several employes named in the five several counts in said petition were employes on, and engaged in operating one and the same train and that the operation of said train constituted but one act on the part of this defendant, and if liable, that defendant is liable for only one penalty for an act in said petition alleged (Rec. 52-3).

Second Assignment of Error.

The District Court erred in refusing defendant's requested instruction No. 1, which is as follows:

1. In this case you are instructed to return a verdict for the defendant (Rec. 53).

Third Assignment of Error.

The District Court erred in refusing defendant's requested instruction No. 2, which is as follows:

2. In case you find the defendant has violated the statute in any of the counts of the Government's petition you will assess against it a penalty not to exceed Five Hundred ($500.00) Dollars for each and every violation, and state the amount so assessed in your verdict (Rec. 53-4).

Fourth Assignment of Error.

The District Court erred in the main charge to the jury in not submitting to the jury the question of fixing the amount of the penalty, if any should have been assessed against the defendant (Rec. 54).

IX.

On December 10, 1912, in the Circuit Court of Appeals said assignments were disposed of in the following opinion:

"In the transcript of this case we find none of the assignments of error well taken, and the judgment of the District Court is affirmed."

A judgment was entered on the same day in favor of respondent and against petitioner, The Missouri, Kan-

sas & Texas Railway Company of Texas, and the American Surety Company of New York, its surety, for the ~~amount of the judgment rendered in the~~ District Court (Rec. 57).

X.

A certified copy of the entire record of the said cause in the said Circuit Court of Appeals is herewith furnished as a part of this application, marked "Exhibit A."

Your petitioners are advised and believe that said judgment of the said United States Circuit Court of Appeals in said cause is erroneous, and that this Honorable Court should require the said cause to be certified to it for its review and determination under and in conformity with the provisions of Section 6 of the act of Congress entitled "An Act to Establish Circuit Courts of Appeals, and to Define and Regulate, in Certain Cases, the Jurisdiction of the Courts of the United States and for other Purposes" approved March 3, 1891, and of Section 240 of the Judicial Code, approved March 3, 1911, the said judgment being made final in the said Circuit Court of Appeals by the said Act for the reason that the amount in controversy in this court does not exceed the sum of One Thousand ($1,000.00) Dollars.

XI.

The questions arising in said cause are of great gravity and importance, not so much on account of the

amount of the fine, if incorrectly imposed, but for the reason that the act "To Promote the Safety of Employes and Travelers upon Railroads by Limiting the Hours of Service of Employes Thereon," approved March 4, 1907, in the particulars herein complained of has never been construed by this court; that it is practically impossible for the railroads of the country to determine exactly what is necessary to comply with said law; that at the instance of the Interstate Commerce Commission many suits for infractions of said law are being instituted against railroads, and that it is a matter of general importance, that said statute be construed by this court and the circumstances that impose liability, the limitations of said statute and the extent of liability thereunder be announced.

XII.

The questions presented in said cause in the said United States District Court and in the United States Circuit Court of Appeals by the assignments were:

1. Is a railroad company, which requires or permits a train crew composed of five men to work more than 16 hours, all of the crew going on duty and off duty at the same time liable for one penalty or five penalties?

2. Is a member of a train crew, while not engaged in the movement of his train, or having a duty to perform in connection with such movement between terminals, when relieved until called, he, however, not be-

ing advised as to the length of time that he is relieved from duty, "off duty" within the meaning of the Hours of Service Act?

3. Is the failure of an injector caused by impure water where, owing to a protracted drouth, water cannot be procured that will not foam and thus cause injector failures, an unavoidable accident, within the meaning of the Hours of Service Act?

4. Will the fact that the cause of delay between terminals was not known to the railroad and its officers in charge of its employes at the time they left the terminal and was a cause that could not then be foreseen excuse the requiring or permitting of service for more than 16 hours?

5. The penalty for the violation of the Hours of Service statute not being fixed, is it the duty of the court upon the request of either party to submit to the jury the question of fixing the penalty to be imposed in a case tried before a jury, or should the jury find a verdict of guilty or not guilty, and if guilty the court impose the penalty?

With respect to there questions petitioners contend that but one penalty can be recovered, that the employes during the time stated are off duty, that such engine failure is an unavoidable accident, that the fact mentioned in Question 4 takes the case out of the operation of the law, and that the issue under the circumstances stated in Question 5 should be submitted to the jury.

In Conclusion.

We submit that these propositions, resting on well and long recognized principles of law and abundantly supported by authority, have been ignored by said Circuit Court of Appeals in the decision of said cause.

Wherefore your petitioners respectfully pray that a writ of *certiorari* be issued out of and under the seal of this court to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court on a day certain to be therein designated a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said cause therein entitled *The Missouri, Kansas & Texas Railway Company of Texas, Plaintiff in Error,* v. *The United States of America, Defendant in Error. No.* 2402. and to the end that said cause may be reviewed and determined by this court, and that the said judgment of the said Circuit Court of Appeals in the said cause, and every part thereof, may be reversed by this Honorable Court and your petitioners, as in duty bound, will ever pray.

ALEXANDER S. COKE.
A. H. MCKNIGHT,
HEAD, SMITH, HARE & HEAD,
Attorneys for Petitioners, The Missouri, Kansas & Texas Railway Company of Texas, and The American Surety Company of New York.

Basil H. Smith
Of Counsel.

Eastern District of Texas, County of Grayson.

Cecil H. Smith on oath says that he is an attorney for the petitioners, The Missouri, Kansas & Texas Railway Company of Texas and the American Surety Company of New York, corporations, the above named petitioners, and that as such attorney he is cognizant of the facts herein stated; that the foregoing petition is not interposed for delay, and that the same is true in point of fact.

Cecil H. Smith

Subscribed and sworn to before me this 15th day of January, A. D. 1913.

Seal

S. E. Anderson
Notary Public in and for
Grayson County, Texas.

I hereby certify that in my opinion the foregoing petition is well founded in point of law.

Cecil H. Smith,
Of Counsel for Petitioners.

To Honorable J. W. Ozenby, District Attorney, and Honorable John B. Dailey, Assistant District Attorney of the United States for the Eastern District of Texas Attorneys for the United States of America, Respondent in the foregoing petition:

You are hereby notified that the above and foregoing petition and brief, together with a certified copy of the record in the United States Circuit Court of Appeals in

cause No. 2402, entitled *The Missouri, Kansas & Texas Railway Company of Texas, plaintiff in error*, v. *The United States of America, defendant in error*, will be submitted to the Supreme Court on the 24th day of February, A. D. 1913.

ALEXANDER S. COKE,
A. H. McKNIGHT,
HEAD, SMITH, HARE & HEAD,
Attorneys for Petitioners.

Service of a copy of the above and foregoing petition and brief is hereby accepted this 20th day of January, A. D. 1913.

J. H. Cranby
District Attorney for the United States.

J. B. Dailey
Assistant District Attorney for the United States.

Attorneys for Respondent, The United States of America.

APPENDIX.

BRIEF OF ARGUMENT.

In support of our contentions we here submit the following:

One.

The Act of March 4, 1907, Regulating the Hours of Service of Railway Employes Engaged in Interstate Commerce imposes a penalty for each act of requiring or permitting employes to work overtime, whether one or more employes be involved and not a penalty for each employe required or permitted to work beyond the hours prescribed.

In each of the two cases the Government asks to recover a penalty for each member of a train crew, all of whom are alleged to have been engaged in the operation of a single train and to have gone on duty at the same time and off duty at the same time. The right to a penalty for each member of the crew is challenged by this demurrer. The defendant, by it, contends that the number of penalties recoverable is determined by the number of acts of requiring or permitting employes to work overtime, and not by the number of employes so required or permitted to work, and, therefore, that in any event there was but a single violation of law and but one penalty can be recovered.

The question involves a construction of the following provision of the Hours of Service Act:

"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act, to require or permit any employe subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employe who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty. * * *

"Sec. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employe to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed" * * *

Under these provisions it is clear that a penalty can be recovered "for each and every violation," but what constitutes a violation? That is the precise question at issue.

In each of the following cases the trial court imposed a penalty for each member of a train crew:

U. S. v. G. H. & S. A. Ry. Co.
U. S. v. C. M. & P. S. Ry. Co.
U. S. v. D. & R. G. R. Co.

All unreported, but contained in a pamphlet published by order of the Interstate Commerce Commission, June 6, 1912, entitled "Decisions Construing Federal Hours of Service Act for Railroad Employes."

But the question of the right to impose a penalty for each employe is not discussed in any of the cases; no reason is given for the court's action; no authority is cited to support it, nor indeed is there anything in the records indicating that the point was raised by the defendants. The rulings, therefore, throw little light upon the situation. There is no other case involving the question. Consequently, it must be answered from principle, and not from precedent.

Looking to the language of the Act, there is nothing in it requiring the construction contended for by the Government. It does not say that the common carrier shall be subject to a penalty for each and every employe required or permitted to work overtime, but for "each and every violation." A violation is an act, and the number of violations is not necessarily dependent upon the number of employes involved. If one employe is required or permitted to work beyond the prescribed hours there is one violation, but if several employes by a single act are required or permitted to work overtime the number of violations is not increased. There is still but one.

The act of requiring or permitting members of a train crew to work overtime where they are engaged in handling the same train and go on duty at the same time and off duty at the same time is single, and but one penalty can be recovered for it.

The construction placed by the courts upon other statutes sustains our contention.

In the case of *B. & O. S. W. R. R. Co.* v. *U. S.*, 220 U. S. 94, the court had under consideration Sec-

tions 1, 2 and 3 of the Act to Prevent Cruelty to Animals, approved June 29, 1906, reading as follows, omitting immaterial parts:

"Sec. 1. That no railroad * * * whose road forms any part of a line of road over which cattle * * * or other animals shall be conveyed * * * (in interstate commerce) * * * shall confine the same in cars, boats or vessels of any description for a period longer than 28 consecutive hours without unloading the same in a humane manner, into properly equipped pens, for rest, water and feeding, for a period of at least five consecutive hours, unless prevented by unavoidable causes.

"Sec. 2. That animals so unloaded shall be properly fed and watered during such rest.

"Sec. 3. That any railroad * * * who knowingly and wilfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred dollars nor more than five hundred dollars."

The defendant confined some cattle beyond the time authorized, and the question arose as to whether a penalty could be recovered for each shipment or whether but one penalty could be recovered for any number of cattle loaded at the same time—and unloaded at the same time, without reference to ownership or the number of shipments. The court held that but one penalty could be recovered, saying that since the animals were loaded at the same time, "the 28 hours of their lawful confinement necessarily expired at the same time. The simultaneous failure to unload these four cars was single and punishable as a single offense."

The case of *The M. K. & T. Ry. Co. of Texas* v. *State*, 97 S. W. 724, is also instructive in this connection. The court there had under consideration what is commonly called the Texas Water Closet Statute, which required railroad companies to construct, maintain and keep in sanitary condition water closets for both male and female persons at each and every passenger station on their lines of railway, and which provided that any railway company

"which fails, neglects or refuses to comply with the provisions of this act shall forfeit and pay to the State of Texas the sum of $100.00 for each week it so fails and neglects. The county attorney of the county in which said station is located * * * shall * * * institute suit or suits in the name of the State * * * for the recovery of said penalty."

The defendant was charged with having failed to comply with this law at two stations in Rains County, Texas, for a period of twelve weeks. The trial court held that a penalty could be recovered for each station, but the Court of Civil Appeals declined to follow this holding. It said:

"Considering the act as a whole, it is clear that the penalty is imposed for the failure by railway corporations to comply with its provisions in each county," and not at each station.

The question of what constitutes the violation of a statute has arisen many times in criminal cases, wherein defendants have sought to quash indictments on the ground of duplicity. In each of the following cases a single offense was charged for the doing of a single act,

involving two or more persons, at one time, and it was held that there was but one offense:

United States v. *Scott*, 74 Fed. 213 (unlawfully soliciting funds for political purposes).

Peck v. *State* (Texas), 111 S. W. 1019 (larceny).

Scott v. *State* (Texas), 81 S. W. 950 (assault).

State v. *Warren* (Maryland), 39 Am. St. Rep. 401 (theft).

State v. *Nelson*, 29 Maine, 329 (receiving stolen goods).

Ben v. *State*, 22 Ala. 9 (poisoning).

These cases clearly sustain our contention. If the unlawful solicitation of funds for political purposes from two or more persons, or the theft of property from two or more persons, or an assault upon two or more persons, or receiving stolen goods belonging to two or more persons, or poisoning two or more persons, at one time, is but a single act, is there any escape from the conclusion that but one act is committed in requiring or permitting several employes to work overtime where they are engaged in operating a single train and go on duty at the same time and off duty at the same time?

A consideration of other acts of Congress leads to the same conclusion. Had it been intended that a penalty should be incurred for each employe, Congress would have clearly so provided, as it did in other statutes. Section 4 of the Act of March 3, 1903, provides "that it shall be unlawful for any person * * * to as-

sist or encourage the importation or migration of any alien into the United States" under certain conditions.

Section 5 provides, "that for every violation of any of the provisions of Section 4 of this Act" the person guilty "shall forfeit and pay for every such offense the sum of $1,000.00; * * * and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid." Section 2 of the Accident-Reports Act, approved May 6, 1910, provides that any common carrier failing to make the reports within the time prescribed "shall be punished by a fine of not more than $100.00 for each and every offense and for every day during which it shall fail to make such report after the time herein specified for making the same." Section 20 of the Act to Regulate Commerce as amended June 29, 1906, provides that the carriers subject thereto shall make annual reports and that if any carrier shall fail to make and file such reports within the time specified by the Interstate Commerce Commission it shall forfeit to the United States the sum of $100.00 "for each and every day it shall continue to be in default with respect thereto." This section further authorizes the Commission to prescribe a system of accounts to be observed by the carriers and provides that in case of failure or refusal on the part of any carrier to comply with such requirements it shall forfeit to the United States "the sum of $500.00 for each such offense and for each and every day of the continuance of such offense." Section 6 of the Act to Regulate Commerce as amended June

18, 1910, provides that for a failure or refusal on the part of any common carrier to comply with the terms of any regulation adopted and promulgated by the Interstate Commerce Commission under said section the common carrier shall be liable to a penalty of "$500.00 for each such offense and $125.00 for each and every day of the continuance of such offense." Other examples might be given but these are sufficient. The absence of a provision in the Hours of Service Act expressly fixing a penalty for each employe or for each period of overtime is strong argument that Congress did not so intend.

We submit that the number of employes involved is absolutely immaterial in determining whether there has been one violation or more than one. But if the matter were one of doubt, under the circumstances, the doubt should be resolved against the Government. The act while remedial in one sense is penal in another sense, and no intention on the part of Congress to inflict the penalties beyond that clearly expressed should be presumed. In other words, before a common carrier is held for a penalty for each employe it should be clear that such penalty is authorized.

It follows that the demurrer should have been sustained and judgment rendered for the defendant except as to a single penalty in each case.

Two.

Suit No. 32 involves a construction of the term "on duty."

A member of a train crew while not engaged in the movement of his train or having a duty to perform in connection with such movement is off duty within the meaning of the Hours of Service Act, and the time thus off duty should not be counted in determining whether he worked more than the prescribed hours.

If the crew while waiting at Royse City and at Greenville, under the facts set forth in paragraph 4 of the petition for certiorari were not on duty, there was no violation of the law, for, excluding that time, they did not work exceeding sixteen hours.

The term, "on duty," cannot be made plainer by discussion. The words speak for themselves. "Manifestly, however," as was said in the case of *United States* v. *Denver & Rio Grande R. R. Co., supra*, "they mean to be actually engaged in work or to be charged with present responsibility for such, should occasion for it arise." In other words, an employe is "on duty" only while actually working, or while at his post—ready to do whatever comes to hand.

Under the facts it is clear that the brakemen were not on duty while at Royse City and that the crew were not on duty while at Greenville. Their business was to operate the train, and, in the language of the statute (Section 1), during these periods of waiting they were not "actually engaged in" the movement of the train nor were they "connected with the movement" thereof. This

is the natural conclusion to be reached, and there is no authority justifying a different conclusion.

The following cases deal with the term, "on duty":

United States v. *Illinois Central R. R. Co.*, 180 Fed. 630.

United States v. *C. M. & P. S. Ry. Co.*, (unreported).

United States v. *Kansas City So. Ry. Co.*, 189 Fed. 471.

United States v. *C. M. & P. S. Ry. Co.*, (unreported).

United States v. *D. & R. G. Ry. Co.*, (unreported).

These cases are all included in the pamphlet above mentioned published by order of the Interstate Commerce Commission.

The first two cases present the question whether members of a train crew who are required by the rules of the company to report a definite time before the departure of their train for the purpose of looking it over to see whether everything is in readiness, are on duty during this time. The question was answered in the affirmative. In the Kansas City Southern case it was held that a crew in charge of a train were on duty while waiting for the train to start. In the Chicago, Milwaukee & Puget Sound case decided by the District Court for the Eastern District of Washington, it was held that employes were on duty during mealtime and while waiting for a helper to assist in the movement of their train, although the train was in charge of a watchman during the meal hours and they were relieved from duty until the helper

arrived, the time of his arrival being uncertain. In the Denver & Rio Grande case it was held that a train crew waiting upon a siding for the arrival of another train were on duty. This case also involved preliminary time before the departure of the train.

Whether employes are on duty at a particular time is a question of fact, and each case must be decided upon its own facts. The cases involving the rule requiring employes to report a definite period before the departure of their train are clearly distinguishable from the case at bar. So is the case involving delay waiting for the train to start from the terminal. The cases most nearly akin to the instant case are the two last mentioned. But they may be distinguishable from it upon the facts, and, even if it were otherwise, the reasoning upon which they are based is clearly unsound.

Both of those cases are based upon the authority of *United States* v. *A. T. & S. F. Ry. Co.*, 220 U. S. 37. That case, however, does not sustain the rulings in support of which it is cited. To begin with, that portion of the opinion relied upon is clear *dictum*. And aside from that, the question involved was entirely different from the one here under consideration. That question was whether a certain station was "continuously operated night and day." As the court said, the antithesis is between places so operated and places operated only during the day time. A literal interpretation of the statute would make it inoperative as to many stations, and, under such circumstances, the court might well go farther than otherwise it would in holding that offices not operated only during

the day time were "continuously operated night and day." We have no such antithesis here, and, consequently, no reason to give the language other than its natural meaning. And the opinion shows that the Supreme Court recognized this difference. The court said possibly a "break" of three hours by night and three hours by day would not exclude the office from all operation of the law, but it did not hesitate to hold that a three hours' "break" in the service of a telegraph operator was time off duty. The court also referred to the discussion of the bill in Congress which showed that Congress had in mind even half hour interruptions or periods off duty. The act expressly provides for consecutive hours of service for trainmen and four hours of service not consecutive and fixes different periods of rest for the two classes of service. The Atchison case, therefore, insofar as it is authority, supports our position and not that of the Government.

These cases refer to the further fact that the period off duty was indefinite. But clearly that cannot be material. Suppose at the end of sixteen consecutive hours of service an employe is told that it is not known when he will again be needed but to rest until he is called. If he should in fact not be called until after having had at least ten consecutive hours of rest, would it be said that he had not been off duty during that time? Certainly not.

The time off duty might very well have been considered by Congress in fixing periods of rest. For instance, an employe working sixteen hours, with four "breaks" of one hour each, might need a longer rest than one working sixteen hours with one "break" of four

hours. But it did not do so, and the courts are not authorized to do it. The question in each case is whether there were periods of off duty. If there were such periods —whether long or short, whether definite or indefinite— they should be deducted in determining whether the employe has worked overtime.

We repeat, the crew while waiting at Royse City, and at Greenville were not on duty, and, deducting this time, the law was not violated.

Three.

Suit No. 34 presents the question whether the facts come within the first proviso to Section 3 of the act.

The failure of an injector, caused by impure water, where, owing to a protracted drouth, water cannot be procured that will not foam and thus cause injector failures, is an unavoidable accident within the meaning of the Hours of Service Act.

Section 3 of the Hours of Service Act contains this provision:

"Provided, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employe at the time said employe left a terminal, and which could not have been foreseen."

An unavoidable accident, within the meaning of this proviso, we should say, is something happening without negligence on the part of the carrier and which it should not have guarded against. To change a little the definition of the term given by Judge Trieber in *U. S.* v. *K. C.*

So. Ry. Co., supra, an unavoidable accident is an accident which could not have been foreseen, or, if foreseen, could not have been prevented, by the exercise of that degree of diligence which reasonable men would exercise under like conditions.

The facts stated make an unavoidable accident within the meaning of this proviso. The drouth, which was at the bottom of the trouble was of course an act of God. This made it necessary for defendant to use impure water in its engines. It got the best water it could, but was unable to get water that would not foam, notwithstanding it used a compound to prevent this, and foaming water, the testimony shows, caused injector failures. It regularly inspected its engines, and both injectors were in good condition when the train left the terminal that morning. The record suggests no negligence on the part of defendant, and that which happened without its negligence should be held to be unavoidable.

The delay was caused by the failure of an injector as set out in paragraph 4 of the petition. Of course, knowing of the water trouble, the petitioner had to take that fact into consideration in fixing its divisions, but there is nothing in the facts suggesting that its divisions were too long. On the contrary, it appears that they were sufficiently short. The question arising under the facts which we now present is, was that an unavoidable accident which petitioner was powerless to prevent? We assert that it was and that this takes the case out of the operation of the law.

Four.

Under the facts in each case the delay was the result of a cause not known to the defendant or its officer in charge of the employes at the time they left the terminal and which could not have been foreseen.

Whatever may be the proper definition of the terms "casualty," "unavoidable accident" and "the act of God," it is clear from the last clause of this proviso that Congress did not intend to punish railway companies in cases of delay not attributable to their negligence unless the cause of the delay was known when the employes left a terminal.

The terminals in Suit 32 were Dallas and Denison, and in Suit 34 Fort Worth and Denison. The work of the crew in Suit 32 was to operate a train a distance of 106 miles, the scheduled time for which was eight hours and five minutes, and in Suit 34 to operate a train 96 miles, the schedule time for which was seven hours and five minutes. The equipment was in good condition, and, as the Superintendent, who was the officer of the defendant in charge of the employes, testified, there was nothing known to him when either train left the terminal to indicate, or to cause him to believe, that the other terminal would not be reached well within the sixteen hours allowed. The cause of the delays clearly was unknown to him, and, under the circumstances, they could not have been foreseen.

For the foregoing reasons we respectfully submit that petitioner was entitled to an instructed verdict, and that this assignment in the Circuit Court of Appeals should have been sustained.

Five.

Upon the request of either party the penalty to be assessed in a case arising under the Hours of Service Act should be submitted to the jury, even where the court instructs a verdict for the Government.

Suits by the Government for penalties under the Hours of Service Act are actions at law for debt, and, as such, are civil suits.

Hepner v. *U. S.*, 213 U. S. 103.
U. S. v. *Ry. Co.*, 182 Fed. 285.
U. S. v. *Ry. Co.*, 184 Fed. 32.

In a civil suit, where the damages or penalties are not made certain and fixed by the terms of the contract or statute, the court, upon request, should submit to the jury the question of assessing the damages or penalties.

Renner v. *Marshall*, 1 Wheat. 215.
Aurora v. *West*, 7 Wall. 104.
Armstrong v. *Carson*, 2 Dall. 302.
Kenyon v. *Gilmer*, 131 U. S. 22.
Hines v. *Darling*, (Mich.) 57 N. W. 1081.
McDaniel v. *Gate City Gas Light Co.* (Ga.), 3 S. W. 693.

In *Aurora* v. *West*, Justice Clifford, speaking for the court, said:

"Where the sum for which judgment should be rendered is uncertain, the rule in the Federal Courts is that the damages shall, if either of the parties request it, be assessed by a jury.

"But if the sum for which judgment should be rendered is certain, as where the suit is upon a bill of exchange or promissory note, the computation may be made by the court, or what is more usual, by the clerk; and the same course may be pursued even when the sum for which judgment should be rendered is uncertain if neither party requests the court to call a jury for that purpose."

In the case of *Hines* v. *Darling*, an action was brought against Darling to recover a penalty for wilfully obstructing a ditch. The statute provided a maximum penalty for such offense of $25.00 and did not prescribe whether it was to be fixed by the court or the jury. The Supreme Court of Michigan, under these circumstances, said:

"In such cases, either party is entitled to a jury trial, and the amount of the penalty was for their consideration."

The case of *McDaniel* v. *Gate City Gas Light Company* was a suit by the Governor of Georgia for the benefit of certain informers against the Gas Light Company for a penalty not exceeding Five Hundred ($500.00) Dollars for the failure upon the part of such Gas Light Company to return to the Secretary of State certain bonds which it desired to issue and put in circulation. The statute provided for a penalty not exceeding Five Hundred ($500.00) Dollars, and makes no provision as to whether the court is to fix the penalty under such statute or the jury, and the Supreme Court of Georgia held that under such statute the amount of the penalty was a question for the jury to decide.

The penalty prescribed in the Hours of Service Act is not definite. Companies violating its provisions are liable to a penalty of not to exceed $500.00 for each and every violation. Request was made of the trial court to submit to the jury the fixing of the penalties. This request was refused, and exceptions were reserved. The refusal, we submit was error.

The Circuit Court of Appeals should have sustained the third and fourth assignments of error.

Six.

In a consolidated cause, involving two suits of five counts each, where in any event but one penalty can be recovered in each case, it is plain error for the court to instruct the jury to find against defendant on each count and to assess a penalty on each count.

For the reasons stated under the first subdivision of this argument petitioners, in any event, are liable for only one penalty in each case. The court instructed the jury to find against it on each of the five counts in each case, and assessed a penalty on each count. Its action in so doing is such fundamental error as the court will consider without an assignment.

U. S. v. *T. & C. R. Co.*, 176 U. S. 242.
U. S. v. *Pena*, 175 U. S. 500.
School District v. *Hall*, 106 U. S. 428.

Respectfully submitted,

ALEXANDER S. COKE,
A. H. MCKNIGHT,
HEAD, SMITH, HARE & HEAD,
Attorneys for Petitioners.

Cecil H. Smith,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, and AMERICAN SURETY COMPANY, OF NEW YORK,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. 480

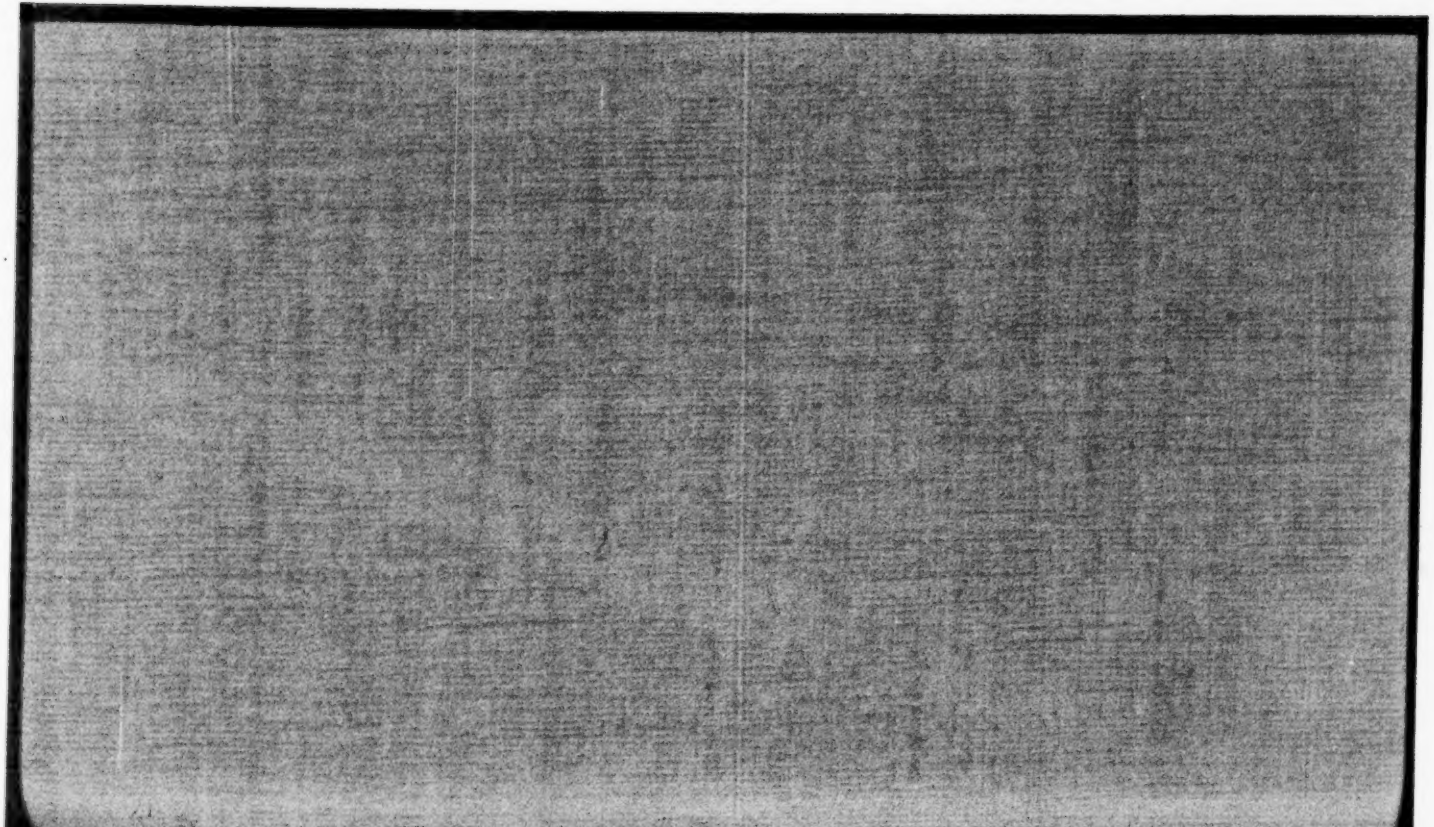
CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONERS.

ALEXANDER S. COKE,
A. H. McKNIGHT,
HEAD, SMITH, HARE, MAXEY & HEAD,
Attorneys for Petitioners.

JOSEPH M. BRYSON,
CECIL H. SMITH,
Of Counsel.

St. Louis Law Printing Co., Printers' Bldg., Ninth and Walnut. Bell, Main 1818.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, and AMERICAN SURETY COMPANY, OF NEW YORK,
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UNITED STATES OF AMERICA,
Respondent.

No. _____.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONERS.

STATEMENT.

On February 1, 1912, respondent filed in the District Court of the United States for the Eastern District of Texas, at Sherman, two suits for penalties, Nos. 32 and 34, in said court based upon the Hours of Service Act, which said suits were consolidated and tried together.

PLEADINGS OF RESPONDENT.

In suit No. 32 the allegations of the petition are as follows:

"Now comes the United States of America, by James W. Ownby, United States Attorney for the Eastern District of Texas, and brings this action on behalf of the United States against the Missouri, Kansas & Texas Railway Company of Texas, a corporation organized and doing business under the laws of the State of Texas, and having an office and place of business at Denison, in the State of Texas; this action being brought upon suggestion of the Attorney-General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

"For a first cause of action plaintiff alleges that said defendant is and was, during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Texas.

"Plaintiff further alleges that in violation of the Act of Congress, known as 'An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon', approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 12:50 o'clock a. m. on November 30, 1911, upon its line of railroad at and between the stations of Dal-

las, in the State of Texas, and Denison, in said State, within the jurisdiction of this Court, required and permitted its certain engineer and employe, to-wit, E. E. Stone, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit, from said hour of 12:50 a. m. on said date to the hour of 8:30 o'clock p. m. on said date.

"Plaintiff further alleges that said employe, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 622, drawn by its own locomotive engine No. 562, said train being then and there engaged in the movement of interstate traffic.

"Plaintiff further alleges that by reason of the violation of said Act of Congress said defendant is liable to plaintiff in the sum of five hundred dollars.

"For a second cause of action plaintiff alleges that said defendant is and was during all the times mentioned herein a common carrier engaged in interstate commerce by railroad in the State of Texas.

"Plaintiff further alleges that in violation of the Act of Congress, known as 'An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon', approved March 4, 1907 (contained in 34 Statutes at Large, p. 1415), said defendant, beginning at the hour of 12:50 o'clock a. m. on November 30, 1911, upon its

line of railroad at and between the stations of Dallas, in the State of Texas, and Denison, in said State, within the jurisdiction of this court, required and permitted its certain fireman and employe, to-wit, J. A. Blackburn, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit, from said hour of 12:50 a. m. on said date to the hour of 8:30 o'clock p. m. on said date.

"Plaintiff further alleges that said employe, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 622, drawn by its own locomotive engine No. 562, said train being then and there engaged in the movement of interstate traffic.

"Plaintiff alleges that by reason of the violation of said Act of Congress said defendant is liable to plaintiff in the sum of five hundred dollars.

"For a third cause of action plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Texas.

"Plaintiff further alleges that in violation of the Act of Congress, known as 'An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon', approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 12:50

a. m. on November 30, 1911, upon its line of railroad at and between the stations of Dallas, in the State of Texas, and Denison, in said State, within the jurisdiction of this court, required and permitted its certain conductor and employe, to-wit, E. V. Kyle, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit, from said hour of 12:50 o'clock a. m. on said date to the hour of 8:30 o'clock p. m. on said date.

"Plaintiff further alleges that said employe, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 622, drawn by its own locomotive engine No. 562, said train being then and there engaged in the movement of interstate traffic.

"Plaintiff further alleges that by reason of the violation of said Act of Congress said defendant is liable to plaintiff in the sum of five hundred dollars.

"For a fourth cause of action plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Texas.

"Plaintiff further alleges that in violation of the Act of Congress, known as 'An Act to promote the safety of employes and travelers upon railroads, by limiting the hours of service of employes thereon', approved March 4, 1907 (contained in 34 Statutes at

Large, page 1415), said defendant, beginning at the hour of 12:50 a. m. on November 30, 1911, upon its line of railroad at and between the stations of Dallas, in the State of Texas, and Denison, in said State, within the jurisdiction of this court, required and permitted its certain brakeman and employe, to-wit, J. E. McCarty, to be and remain on duty for a longer period than sixteen consecutive hours, to-wit, from said hour of 12:50 a. m. on said date to the hour of 8:30 p. m. on said date.

"Plaintiff further alleges that said employe, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 622, drawn by its own locomotive engine No. 562, said train being then and there engaged in the movement of interstate traffic.

"Plaintiff further alleges that by reason of the violation of said Act of Congress said defendant is liable to plaintiff in the sum of five hundred dollars.

"For a fifth cause of action plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Texas.

"Plaintiff further alleges that in violation of the Act of Congress, known as 'An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon', approved March 4, 1907 (contained in 34 Statutes at Large, page

1415), said defendant, beginning at the hour of 12:50 o'clock a. m. on November 30, 1911, upon its line of railroad at and between the stations of Dallas, in the State of Texas, and Denison, in said State, within the jurisdiction of this court, required and permitted its certain brakeman and employe, to-wit, M. Dolan, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit, from said hour of 12:50 o'clock a. m. on said date to the hour of 8:30 p. m. on said date.

"Plaintiff further alleges that said employe, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 622, drawn by its own locomotive engine No. 562, said train being then and there engaged in the movement of interstate traffic.

"Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

"Wherefore, plaintiff prays judgment against said defendant in the sum of twenty-five hundred dollars and its costs herein expended." (Rec., pp. 2-7.)

In suit No. 34 the allegations of the petition are as follows:

"Now comes the United States of America, by James W. Ownby, United States Attorney for the Eastern District of Texas, and brings this action on behalf of

the United States against the Missouri, Kansas & Texas Railway Company of Texas, a corporation organized and doing business under the laws of the State of Texas, and having an office and place of business at Denison, in the State of Texas; this action being brought upon suggestion of the Attorney-General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

"For a first cause of action plaintiff alleges that said defendant is and was during all the times mentioned herein a common carrier engaged in interstate commerce by railroad in the State of Texas.

"Plaintiff further alleges that in violation of the Act of Congress, known as 'An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon', approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 6:15 o'clock p. m. on November 11, 1911, upon its line of railroad at and between the stations of Ft. Worth, in the State of Texas, and Denison, in said State, within the jurisdiction of this court, required and permitted its certain engineer and employe, to-wit, H. T. Bryson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit, from said hour of 6:15 p. m. on said date to the hour of 12:05 o'clock p. m. on November 12, 1911.

"Plaintiff further alleges that said employe, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 404, drawn by its own locomotive engine No. 102, said train being then and there engaged in the movement of interstate traffic.

"Plaintiff further alleges that by reason of the violation of said Act of Congress said defendant is liable to plaintiff in the sum of five hundred dollars.

"For a second cause of action plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Texas.

"Plaintiff further alleges that in violation of the Act of Congress, known as 'An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon', approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 6:15 p. m., on November 11, 1911, upon its line of railroad at and between the stations of Ft. Worth, in the State of Texas, and Denison, in said State, within the jurisdiction of this court, required and permitted its certain fireman and employe, to-wit, H. O. Balderbeck, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit, from said hour of

6:15 o'clock p. m. on said date to the hour of 12:05 o'clock p. m. on November 12, 1911.

"Plaintiff further alleges that said employe, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 404, drawn by its own locomotive engine No. 102, said train being then and there engaged in the movement of interstate traffic.

"Plaintiff further alleges that by reason of the violation of said Act of Congress said defendant is liable to plaintiff in the sum of five hundred dollars.

"For a third cause of action plaintiff alleges that said defendant is, and was during all times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Texas.

"Plaintiff further alleges that in violation of the Act of Congress known as 'An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon', approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 6:15 p. m. on November 11, 1911, upon its line of railroad at and between the stations of Ft. Worth, in the State of Texas, and Denison, in said State, within the jurisdiction of this court, required and permitted its certain conductor and employe, to-wit, J. B. Kanody, to be and remain on duty as such for a longer period than six-

teen consecutive hours, to-wit, from said hour of 6:15 p. m. on said date, to the hour of 12:05 p. m. on November 12, 1911.

"Plaintiff further alleges that said employe, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 404, drawn by its own locomotive engine No. 102, said train being then and there engaged in the movement of interstate traffic.

"Plaintiff further alleges that by reason of the violation of said Act of Congress said defendant is liable to plaintiff in the sum of five hundred dollars.

"For a fourth cause of action plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Texas.

"Plaintiff further alleges that in violation of the Act of Congress, known as 'An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon,' approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 6:15 o'clock p. m. on November 11, 1911, upon its line of railroad at and between the stations of Ft. Worth, in the State of Texas, and Denison, in said State, within the jurisdiction of this court, required and permitted its certain brakeman and employe, to-

wit, T. B. Taylor, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit, from said hour of 6:15 o'clock p. m., on said date, to the hour of 12:05 p. m. on November 12, 1911.

"Plaintiff further alleges that said employe, while required and permitted to be and remain on duty, as aforesaid, was engaged in and connected with the movement of said defendant's train No. 404, drawn by its own locomotive engine No. 102, said train being then and there engaged in the movement of interstate traffic.

"Plaintiff further alleges that by reason of the violation of said Act of Congress said defendant is liable to plaintiff in the sum of five hundred dollars.

"For a fifth cause of action plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Texas.

"Plaintiff further alleges that in violation of the Act of Congress, known as 'An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon,' approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 6:15 o'clock p. m. on November 11, 1911, upon its line of railroad at and between the stations of Fort Worth, in the State of Texas, and Denison, in said State, within the jurisdiction of this court, required

and permitted its certain brakeman and employe, to-wit, Roy Ford, to be and remain on duty as such for a longer period than sixteen consecutive hours, to-wit, from said hour of 6:15 o'clock p. m. on said date to the hour of 12:05 o'clock p. m. on November 12, 1911.

"Plaintiff further alleges that said employe, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 404, drawn by its own locomotive engine No. 102, said train being then and there engaged in the movement of interstate traffic.

"Plaintiff further alleges that by reason of the violation of said Act of Congress said defendant is liable to plaintiff in the sum of five hundred dollars.

"Wherefore, plaintiff prays judgment against said defendant in the sum of twenty-five hundred dollars and its costs herein expended" (Rec., pp. 8-13).

PLEADINGS OF PETITIONER.

On May 24, 1912, petitioner Railway Company (the other petitioner was not a defendant in the suits, it being simply surety on the Railway Company's bond in its appeal from the judgment) filed its answers in said suits, the answers being identical in both causes, and as follows:

"Now comes the defendant, Missouri, Kansas &

Texas Railway Company of Texas, and for answer herein says:

"I.

"Defendant demurs to plaintiff's original petition and says the same is insufficient in law, and of this it prays judgment of the court.

"II.

"Defendant specially excepts to plaintiff's petition, and says, that the Act of Congress on which it is based is invalid, because Congress has not power to prescribe the hours of service of employes engaged in interstate commerce, except in so far as it may do so by virtue of the commerce clause of the Federal Constitution, and that this act is not a regulation of interstate commerce within the meaning of that clause.

"III.

"Defendant specially excepts to plaintiff's original petition and says that the act upon which it is based is void, because its provisions are arbitrary and unreasonable, and there is no just basis for the classification made in said act, the act applying alone to common carriers by railroad, and therefore it deprives the railroad companies of their property without due process of law, contrary to the fifth amendment to the Constitution of the United States.

"IV.

"Defendant specially excepts to plaintiff's original petition as defective, in that the same does not negative the exceptions contained in the proviso 2, section 3, of the act on which it is based.

"V.

"Defendant specially excepts to plaintiff's original petition and says that it appears from said petition that the five penalties sought to be recovered in this case grow out of one act, in violation of the Act on which the cause of action is based, and it appears from said petition that the five several employes named in the five several counts in said petition were employes on and engaged in operating one and the same train and that the operation of said train constituted but one act on the part of this defendant, and if liable, that defendant is liable for only one penalty for an act in said petition alleged.

"VI.

"Defendant denies each and every allegation in plaintiff's petition contained and of this it demands strict proof.

"VII.

"For special answer herein, defendant says that if it is true, as alleged by plaintiff, that its employes were

required and permitted to labor within the hours in said petition alleged, that the labor by said employes and work by them was the result of an unavoidable accident, and the cause thereof was unknown to defendant, or its officers or agents in charge of said employes at the time said employes left the terminal, and that such cause could not have been foreseen by defendant, its officers or agents in charge of said employes.

"Wherefore, defendant prays that it be discharged with its costs" (Rec., pp. 14-18).

CASES CONSOLIDATED.

On May 29, 1912, by order of Court, the two causes (and suit No. 35) were consolidated, the three suits being between the same parties and involving, in a measure, the same state of facts and the same law.

The judgment in cause No. 35 was paid (Rec., p. 22). Hence this proceeding involves only suits 32 and 34.

EXCEPTIONS OVERRULED.

On the same day petitioner's general and special exceptions to respondent's original petitions were heard and overruled and petitioner reserved exceptions (Rec., p. 19).

FACTS PROVEN.

The cases were tried to a jury and the following agreement was made and facts were produced in evidence:

"It is agreed that The Missouri, Kansas & Texas Railway Company of Texas is a corporation organized and doing business under the laws of the State of Texas; that it is a common carrier engaged in interstate commerce by railroad in the State of Texas. It is further agreed that the trainmen alleged in the three several cases tried were the trainmen in charge of the alleged trains, and that they commenced work at the times alleged in the petitions and were finally released at the times alleged in the several petitions, and that during the time, from the time called to the time released, they were in the service, except as may be shown by proof offered; that all of said employes and trains were engaged in handling interstate traffic at the times alleged in the respective petitions. It is further understood that causes Nos. 32, 34 and 35 are tried together on these facts" (Rec., pp. 24-25).

Plaintiff thereupon rested.

J. Munday, a witness for the defendant, testified: "Am superintendent of The Missouri, Kansas & Texas Railway Company of Texas, at Denison, and my jurisdiction covers the portions of the road from Dallas to Denison, Denison to Wichita Falls, and the Bonham

and Sherman branches. Now have no jurisdiction south of Dallas, but did have such jurisdiction in November, 1911, and during that time was superintendent south to Hillsboro, which includes the line to Ft. Worth as well as the line to Dallas. As superintendent I had charge of the conductors and train crews in handling trains; had supervision over the operation of trains.

"In suit No. 32, train No. 622, engine 562, Conductor Kyle, Engineer Stone was called to leave and left Dallas at 12:50 a. m. November 30, and arrived at Denison at 8:30 p. m., November 30. The train was delayed from 8:00 a. m. until 9:35 a. m. at West Yards, which is the yard near Greenville, and then again from 12:30 p. m. until 3:50 p. m., also at West Yards. Eight hours and five minutes from Dallas to Denison was the schedule running time of this train from Dallas to Denison, Dallas being the initial point and Denison the terminal. I knew nothing on the morning that the train left Dallas to indicate that it would not reach Denison in 16 hours, and had no reason to expect they would go over the time.

"Suit No. 34 charges that the crew of train 404, engine No. 102, left Ft. Worth at 6:15 p. m. November 11, and went off duty at 12:05 a. m. November 12. The running record of that train as shown by train sheet from Ft. Worth to Denison, and the delays it encountered are these: That train was called to leave Ft. Worth at 6:15 p. m. November 11, and left at that time,

and arrived at Denison at 12:05 p. m. November 12, which would make 17 hours and 50 minutes. The sheet shows there was two hours delay between Pottsboro and Denison. Pottsboro was situated 8 and 7/10 miles from Denison. There was a telegraph station at Ray between Pottsboro and Denison and the train stopped at Ray. The regular schedule time of this train between Ft. Worth and Denison was 7 hours and 5 minutes. At the time the train left Ft. Worth I knew nothing indicating that the train crew would not reach Denison in 16 hours. I was unaware of any circumstances indicating anything of the kind. The company regularly inspects its engines and keeps them in good repair as far as it reasonably can.

Cross-Examination.

The only two delays I mentioned to the train crews involved in suit No. 32 were the two at West Yards; they were the most important delays. The train arrived at Garland at 3:30 a. m. and left at 3:40 a. m., arrived at Rockwell at 5:02 and left at 5:55, arrived at Royse City at 6:44 and left at 7:07, arrived at Caddo Mills at 7:32 and left at 7:34, arrived at Whitewright at 5:25 and left at 5:40, arrived at Bells at 6:05 and left at 6:57. Those are all the delays I am able to find in addition to what I have already shown. There may have been some delays at blind sidings that we have no figures for" (Rec., pp. 25-7).

E. V. Kyle, testified for defendant as follows: "November 30, 1911, I was freight conductor for the defendant, and handled train No. 622, engine 562, between Dallas and Denison on that date. I kept a record of the delays I encountered on the road. I have no personal recollection of the delays I sustained, and would have to refresh my recollection by looking at my train book. I have the train book with me. My record shows that I was delayed 50 minutes at Rockwall doubling into that place. The engine would not handle the train up the hill and we had to double, and we also placed a car of merchandise on the house track. It was a very cold morning and we had a full load for the engine and a very frosty rail, and the engine slipped and was not able to start the train on the side of the hill, and we took half the train to Rockwall and came back and got the other half, and we had a car of merchandise to place on the house track at Rockwall, and that and the delay doubling the hill amounted to 50 minutes in the aggregate. Could not say how much of the delay was caused by the frosty rail and the engine slipping down the hill and how much was caused by setting out the car of merchandise. I presume we consumed 35 or 40 minutes doubling the hill and the balance of the time setting out the car. The next delay was at Royse and there we met a passenger train and two extras, and that probably delayed us 15 minutes, and we ran out of water there and made a run for

water. After I returned I was delayed 30 minutes waiting for No. 6, the Flyer, and placing two cars of water at the oil mill, which was commercial work. The water placed at the mill was water we had in the train and delivered there. We ran to Greenville for water for the engine. We left the train at Royse and made the run to Greenville with the engine and got the water. Myself and the engineer and fireman went to Greenville for water. I left the brakemen with the train. Could not state positively what time we left Royse for Greenville. The brakemen had no duties to perform with reference to the train during the time we were going from Greenville to Royse for water and coming back. We left Greenville to go back to Royse at 9:35 a. m., and we got there about eight. During the hour and 35 minutes we were eating breakfast and waiting for the engine I had nothing to do with the movement of the train and engine during that time. I was not with the engineer and fireman during that time and don't know what they did. The roundhouse force at the roundhouse at Greenville had charge of the engine during that time. I know they took charge of it. We arrived back at Royse at 10:30 a. m., but I have no record of the time of departure from Royse, and I have no record of the time of arrival back at Greenville. When we got back to Royse I found the brakemen in the caboose, but I don't remember what they were doing. My record shows we were at Greenville from

12:30 p. m. until 3:50 p. m. waiting for repairs on the engine. I can say that during that time I was not working and had nothing to do with the train. My record is silent about that; it does not say I did work or did not. I state as a fact I did not work during that time. I have no distinct recollection of what I was doing, but I know I was not working. At Greenville all work in the yards is done by the switching crew. Cars were taken out and cars added to the train by the switch engine and its crew. We got the train back from the yard crew when the engine came back from the roundhouse. During the period of time we were at Greenville I could not say positively whether the engineer and fireman did any work in connection with the engine. The yard crew uses its own engine. That was the last delay I have until we reached Denison.

Cross-Examination.

"After leaving Greenville we made schedule running time. I could not say from the records or otherwise where we were on the trip when the 16 hours expired. I was probably along about Celeste about that time. I did not know the 16-hour law had expired on me; I did not pay any attention to it. Independent of the usual custom and records, I remember this was Thanksgiving Day. The first delay of any consequence on the trip was when we got out of water at Royse and had to send the engine to Greenville for water. We ar-

rived at Royse at 6:50 and got back there from Greenville at 10:30. It must have been 11 o'clock when we left Royse finally, but I have no record of that. The delay is chargeable to the fact that we didn't have water enough to run the engine. I have no record of the time of the second arrival at Greenville. My engineer and fireman and myself took the water car and engine and went to Greenville for water. The two brakemen stayed in the caboose waiting for us to come back. I did not know just what time we could get back and the brakemen did not know, and they stayed with the caboose and train waiting for us to come back. The first time we went to Greenville and made the trip for water as stated the engine went in on the dump track and I went to the lunch counter. The tank had to be filled with water and the fire in the engine cleaned. Do not know how long it would take to do that. The engineer and firemen got breakfast about as I did. They were waiting for the water and for the engine to come up, and then we were to go back to Royse. We went back to Royse and got the balance of the train and went on to Greenville again. I could not say that the engine broke down, but I have no record of repairs on the engine. The record shows we were delayed for repairs on the engine from 12:30 to 3:50. But for the records, I could not say positively that I was in Greenville on that day. When we got to Greenville we just backed into the yard. I do not remember that I received a

telegram releasing me from duty. I could state that I was not doing anything at the time we were in Greenville. We were waiting until the engine could be fixed so we could resume our duties. I did not know what time the engine would be completed and there was no way for me to tell. I was waiting there until the engine could be fixed and I could go on to Denison, an indefinite time. The same was true with reference to the other men as to whether they were on duty or not. We were all waiting there until that engine could be repaired at some indefinite time, we didn't know then, and as soon as the engine was repaired we expected to go on to Denison.

Redirect Examination.

"After I got to Denison and turned my train loose, I waited there until they called me to go on another run, and during the interval was not working. There is a place in the caboose for the brakemen to sleep and they could have gone to sleep if they had wanted to. There were also facilities for them to get something to eat. After we got through the repairs on the engine at Greenville the engineer brought the engine back from the roundhouse. It was not necessary for me to be notified; I was in the office where I could see the engine. I had nothing to do during the time I was in Greenville. When the train left Dallas I was expecting under my employment to take the train through to Deni-

son, Denison being the terminal of that run. The employment was not finally completed until I arrived at Denison with the train, my trip was not ended until I got to Denison. I had 15 loads and 21 empties in my train at Rockwall, being 36 cars, which was full tonnage for the engine. I suppose the engine could have handled ten per cent less tonnage on the hill at Rockwall without having to double the hill. My engine had a rating of 985 tons, and I had 949 tons on this occasion. I had no reason to anticipate that morning that I could not get through with my train. I believe November, 1911, was a very dry time, and we had trouble keeping water for the engines. There was no water station between Dallas and Greenville. Of course we had water stations, but there was no water between Dallas and Greenville, and we carried a water car for the purpose of supplying the engine. Such an occurrence of having to run to a station for water was rather usual at that time.

Recross-Examination.

"Q. You drew pay from the railroad company for 19 hours and 40 minutes on that trip, didn't you?

"A. Yes, sir.

"The regular schedule of the train was 7 hours and 5 minutes, and upon the occasion in question we made the trip in 19 hours and 40 minutes.

Redirect Examination.

"We are paid for the hours we are out the road between terminals, and this is true whether we are released on the road or not. If we were on the road from Dallas to Denison 12 hours, and are released at Greenville for five hours, we are paid for the five hours. That is the conductor's contract with the railroad" (Rec., pp. 27-33).

H. T. Bryson, a witness for the defendant, testified: "I am an engineer in the employment of the defendant and was so engaged in November, 1911. On that date I made a run from Ft. Worth to Denison on train No. 404, engine 102, beginning November 11 at 6:15 p. m. and ending November 12, 1911. The initial point of that train was Ft. Worth, and the terminal point Denison. The condition of the engine when we left Ft. Worth was good, and I had no trouble with it until I left Pottsboro, which is 8.7 miles from Denison. I there had trouble with the injectors. The one on the left would not work at all, and the one on the right would only work when the engine was standing still. The injector would not take up the water, and I had to stop, as an engine cannot be run without water in the boiler. When I left Pottsboro I had 18 minutes in which to reach Denison within the 16 hours. My intention was to go to Ray and head in at Ray, and I had plenty of time to do that. I know I did not have a full

train; that train was a light one. At Ray the train would have been taken in charge by the yard crew. There would have been a switch engine standing on the main line and when I stopped he would couple on to me. They take the train and put it away. I do not know how much I was delayed on account of the injector; I would not let them move me for some time because I had no water and did not think it was safe to move. I let the engine stand still until I got it full of water, and then he proceeded to town with the engine. I have run on the main line Dallas to Denison, and made such run in November, 1911, but the date I would not state. I know how trains were handled in the yards at Greenville. If anything has to be done to the engine at Greenville the brakemen would cut the engine loose from the train and the engineer take it up to the dump track, and after it was put on the dump track the engineer would have nothing more to do with it at all and would not go back to the engine unless the call boy told him what time he was going out. If he did not, I would go to the restaurant and stay until he came after me. If I carried the engine in at 12:30 p. m. and it was not ready to go out until 3:50 p. m. I would have nothing to do with the engine during that time. I would not go around to the roundhouse. I would go to the restaurant and stay there until the call boy came after me to notify me that the engine was ready. That was the general custom of all the

engineers and firemen there. They had a yard crew there, and they would be in charge of the engine during that time. The hostler would have charge of the engine. The hostler is an employe at the roundhouse and does not run on the road at all.

Cross-Examination.

"I am working for the defendant now as an engineer. I had no trouble with the right injector until I got to Pottsboro. I tried the left one at Pottsboro. You never work it unless you go to mix up compound. We cannot leave without both injectors in proper order. Both injectors were out of fix. I had to stop to get the engine hot between Pottsboro and Denison. That was not before I got to Pottsboro. I remember this trip because it was a hard one. I remember the trip. 759 is Ft. Worth. We were not delayed there 30 minutes on account of the air on the engine that I remember; there was nothing wrong with the engine. If the conductor's record shows that, I would not undertake to state it was not a fact, but I know if there had been anything wrong with the engine I would have had some one to fix it, and I know there was no one fixed the engine. I do not remember the numbers of the stations. It is always the rule at Whitesboro to eat, and we ate breakfast at Whitesboro. There was no delay there on account of getting the engine hot. I don't know what the conductor's report shows, for I have never seen it.

I don't remember being delayed there blowing up. I could not get one of the injectors to prime at Whitesboro. That was the fault of the injector, and it had to be repaired before it could be used again. I did not repair it on the trip. The other injector, the right one, was working pretty fair, nothing extra. It gave out between Pottsboro and Ray. There is no station between Pottsboro and Ray. The steam got down low. The injector was out of fix before that, and it was the fault of the injector. I did not fix the injector. I went on into Denison. The switch engine turned my train over to the roundhouse people. I made a report at the roundhouse coming into Denison on this trip. I reported that the right injector would not work and the left one would not take up the water. The paper you show me is my report on that occasion. I don't find anything in it about the injectors. That report is in my writing. When I come in I report at the roundhouse anything that may be wrong with my engine. I overlooked reporting the engine injectors out of fix. It is necessary for the injectors to be all right to run the engine. Whether an injector gets out of fix it depends on the water. If you have good water, injectors are not apt to get out of fix. If you have muddy water and have to use a compound, they are bad, the compound causing them to corrode. With any and all water it is an ordinary occurrence for an injector to get out of fix. I could not remember the number of times I have made

the trip from Dallas to Denison by Greenville. I was in Greenville and through there in November, 1911, but I could not without my book say how many trips I made, and my book is not here. I do not know what time I got Ray. I do not keep a record of the delays; the conductor does that. His book will show. I stayed on my engine when the switch engine took hold of us. My engine was not dead at that time; I went on with the engine; I never got off it until I got to the dump. The engine dump is where the engines are turned over and the fires cleaned. I surrendered it there to the roundhouse people and made my report after it was turned over. Under the rules of the company we have to make a report, but we register in at the time we arrive on the dump. I have to make a report before I leave the roundhouse.

Redirect Examination.

"When I got to the roundhouse I went to Mr. Corbett, the general foreman, and said, 'Mr. Corbett, you ought to do something with the engine, the left injector will not work at all, and the right one will not take up the water in running,' and he says, 'you must be a good one to run the engine from Ft. Worth here without putting any water in the boiler.' It is necessary that the injectors be put in working order before the engine will steam, and I said in my report that the engine would not steam. My injectors would not work

after I passed Pottsboro, and in order to get water in the engine I had to stop, and when I got the water in I would have no steam and I would then have to get steam enough to proceed. I would have to fire up until the water would make steam and then go as far as I could until that water gave out and stop and get in some more. My engine did not go from Ray to the roundhouse by its own steam, but was hauled in by the switch engine. In November, 1911, the water on the Ft. Worth division was bad. We were using water from Whitesboro, and that was artesian water, and then we got water out of the creek that was very good, but when we mixed it, it would foam and we used the compound. The compound is a chemical used to soften the water. They claim the artesian water foams because there is alkali and soda in it. We used the compound with the bad, muddy water. We took water at Gravel Pit, and that was creek water, and at Mingo, and that was creek water and muddy, and then I got artesian water at Whitesboro, and that was the only good water I had, and mixing it with the muddy water caused it to foam. There was not a great abundance of water in this country last November. I think all the water tanks between here and Ft. Worth were supplied with water. I examined the injectors and the engine before leaving Ft. Worth. I tried both injectors and their condition was good, both of them worked. That

is the rule of every engineer before he starts on a trip.

Recross-Examination.

"I examined the injectors after I got into Denison. The rule required me to make a report to the roundhouse people as to the condition of the engine, they require me to put it on the book. I thought I put on the book the condition of the injectors. I think Mr. Corbett is roundhouse foreman at Denison yet. I did not tell Mr. Corbett where the injector stopped, and he said I must have been a mighty good man to bring an engine from Ft. Worth to Denison. I said the right one would not work while the engine was running and he made that remark. He said Ft. Worth because that was where I started from. The water had been in bad condition for a good while. The condition of the water at this time caused me to have to use compound on that trip. The muddy water ruined the injectors. I knew when I left Ft. Worth that I would use muddy water and the compound. The injectors have a whole lot to do with the steaming of an engine. In some cases an engine will refuse to steam when the injectors are all right. The fact that I reported to the roundhouse people that the engine would not steam did not indicate that there was anything on earth the matter with the injectors.

Redirect Examination.

"Corbett had supervision of the repairs to be made on engine, and I told him about the injectors. After the switch engine came I stayed on my engine because it was in bad shape, and I did not want to leave it until it got on the dump. I thought the crown sheet might be damaged on account of the lack of water, and I did not know how long it would be before they got her on the dump. I remained with the engine and watched it. I do not know where the other members of my crew were. The fireman stayed on the engine and rode up to some street there in Denison and got off and went home. I don't know what went with the others. The injectors are not very apt to get out of order with good water. With such water as we had in November, 1911, it was a common, everyday occurrence for the injectors to get out of fix.

Recross-Examination.

"As engineer I have to stay on the engine until it gets to the dump. The fireman got off about two blocks from the roundhouse. The train was on the dump about 30 minutes after the fireman got off. They had to cut the engine off the train and back it into the dump" (Rec., pp. 33-40).

J. Munday, being recalled by defendant, testified: "During November of last year we did not have good

water for railroad purposes. It did not rain enough was the principal reason. We had trouble in getting as much water as we needed; we had a good deal of trouble in getting enough water to operate the road, as everybody knows, and we had to use most any kind of water we could get, anything that would boil. We would have gotten better water for the service if we could have done so. The scarcity of water was a general condition that prevailed in this country at that time" (Rec., p. 40).

VERDICT INSTRUCTED FOR RESPONDENT.

At the conclusion of the evidence, on May 30th, 1912, the Court instructed a verdict for respondent and against petitioner, on each of the five counts, in each of the three suits (Rec., pp. 40-45), and, when the verdict was returned, assessed a fine of $50.00 for each count in each case against petitioner, a total of $750.00, and entered judgment accordingly (Rec., pp. 20-21).

REQUESTED CHARGES.

At the conclusion of the evidence and before the Court had delivered the main charge to the jury, petitioner requested the Court to give the jury the following instructions, in their order:

"1. In this case you are instructed to return a verdict for the defendant."

"2. In case you find the defendant has violated the

statute in any of the counts of the government's petition you will assess against it a penalty not to exceed five hundred ($500.00) dollars for each and every violation, and state the amount so assessed in your verdict."

The Court refused to give said charges, or either of them, to which petitioner then and there excepted (Rec., p. 46).

At the conclusion of the delivery of the main charge to the jury, and before the jury had retired petitioner excepted to the charge of the Court on the ground that the Court did not submit to the jury the question of fixing the amount of the penalty, and tendered its bill of exceptions (Rec., p. 45).

After the trial petitioner assigned errors (Rec., pp. 51-54), sued out writ of error (Rec., pp. 47-49), filed its approved supersedeas bond with petitioner, the American Surety Company of New York, as surety thereon (Rec., pp. 49-51), and carried the causes to the United States Circuit Court of Appeals for the Fifth Circuit for review.

In the Circuit Court of Appeals the following errors were urged:

ASSIGNMENT OF ERRORS.

"1. The District Court erred in overruling defendant's fifth special exception to plaintiff's petitions, which is as follows:

'Defendant specially excepts to plaintiff's original petition, and says that it appears from said petition that the five penalties sought to be recovered in this case grow out of one act in violation of the act on which the cause of action is based, and it appears from said petition that the five several employes named in the five several counts in said petition were employes on, and engaged in operating one and the same train and that the operation of said train constituted but one act on the part of this defendant, and if liable that defendant is liable for only one penalty for an act in said petition alleged' (Rec., pp. 52-53).

"2. The District Court erred in refusing defendant's requested instruction No. 1, which is as follows:

'1. In this case you are instructed to return a verdict for the defendant' (Rec., p. 53).

"3. The District Court erred in refusing defendant's requested instruction No. 2, which is as follows:

'2. In case you find the defendant has violated the statute in any of the counts of the Government's petition you will assess against it a penalty not to exceed five hundred ($500.00) dollars for each and every violation, and state the amount so assessed in your verdict' (Rec., pp. 53-54).

"4. The District Court erred in the main charge to the jury in not submitting to the jury the question of fixing the amount of the penalty, if any should have been assessed against the defendant" (Rec., p. 54).

OPINION OF THE CIRCUIT COURT OF APPEALS.

The cause was heard in the Circuit Court of Appeals on December 10, 1912, and the following opinion rendered *per curiam*:

> "In the transcript of this case we find none of the assignments of error well taken, and the judgment of the District Court is affirmed" (Rec., p. 56).

Judgment of affirmance was thereupon entered and petitioners were condemned to pay costs (Rec., p. 57).

Thereafter a petition for *certiorari* was presented to this Court, and on March 10, 1913, a writ of *certiorari* was granted as prayed for, and said cause was brought to this Court for review (Rec., pp. 59-60).

STATUTES INVOLVED.

The Act of Congress approved March 4, 1907, entitled "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon," so far as pertinent to the question involved, is as follows:

> "Sec. 1. * * * the term 'employes' as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.
>
> "Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this

Act, to require or permit any employe subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved, and not required or permitted again to go on duty, until he has had at least ten consecutive hours off duty; and no such employe who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty. * * *

"Sec. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employe to go, be or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such District Attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper District Attorneys information of any such violations as may come to its knowledge. In all prosecutions under this Act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents:

Provided, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employe at the time said employe left a terminal, and which could not have been foreseen: *Provided, further*, That the provisions of this Act shall not apply to the crews of wrecking or relief trains."

BRIEF OF ARGUMENT.

I.

The Act of March 4, 1907, regulating the hours of service of railway employes engaged in interstate commerce imposes a penalty for each act of requiring or permitting employes to work overtime, whether one or more employes be involved, and not a penalty for each employe required or permitted to work beyond the hours prescribed.

In each of the two cases the Government asked for and recovered a penalty for each member of a train crew, all of whom were alleged to have been engaged in the operation of a single train and to have gone on duty at the same time and off duty at the same time. The right to a penalty for each member of the crew is challenged by petitioners, who contend that the number of penalties recoverable is determined by the number of acts of requiring or permitting employes to work overtime, and not by the number of employes so required or permitted to work, and, therefore, that, in no event, can more than two penalties be recovered, there being but a single violation of law, if any, in each case.

The question involves a construction of the following provisions of the Hours of Service Act:

"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act, to require or permit any employe subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employe who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty * * *.

"Sec. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employe to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed * * *."

It is clear that a penalty can be recovered "for each and every violation," but what constitutes a violation? That is the precise question at issue.

In a few cases, the following among them: United States v. Chicago, M. & P. S. Ry. Co., 197 Fed. 624, and United States v. Denver & R. G. Ry. Co., 197 Fed. 629,

the trial court imposed a penalty for each member of a train crew. But in none of them is the question of the right to impose a penalty for each employe discussed. No reason is given for the Court's action; no authority is cited to support it; nor, indeed, is there anything in the records indicating that the point was raised by the defendants. We are, therefore, without any judicial reasoning to aid us in determining what the statute means.

Looking to the language of the Act, there is nothing in it requiring the construction contended for by the Government. It does not say that the common carrier shall be subject to a penalty for each and every employe required or permitted to work overtime. The penalty is imposed for "each and every violation." A violation is an act, and the number of violations is not fixed by the number of employes involved. If one employe be required or permitted to work beyond the prescribed hours there is a violation; but if several employes, by a single act, be required or permitted to work overtime the number of violations is not increased. There is still but one.

The act of requiring or permitting members of a train crew, who go on duty at the same time and off duty at the same time, to work overtime, is single, and but one penalty can be recovered for it. The authorities on analogous questions clearly sustain this contention.

CIVIL CASES IN THE FEDERAL COURTS.

In the case of B. & O. S. W. R. R. Co. v. U. S., 220 U. S. 94, the Court had under consideration Sections 1, 2 and 3 of the Act to Prevent Cruelty to Animals, approved June 29, 1906, reading as follows, omitting immaterial parts:

> "Sec. 1. That no railroad * * * whose road forms any part of a line of road over which cattle * * * or other animals shall be conveyed * * * (in interstate commerce) * * * shall confine the same in cars, boats or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens, for rest, water and feeding, for a period of at least five consecutive hours, unless prevented by unavoidable causes.
>
> "Sec. 2. The animals so unloaded shall be properly fed and watered during such rest.
>
> "Sec. 3. That any railroad * * * who knowingly and wilfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred dollars nor more than five hundred dollars."

The defendant confined some cattle, consisting of eleven shipments, beyond the time authorized, and the question arose, what constituted a violation of the act. The Government contended that a penalty could be recovered for each shipment. The railway company in-

sisted that the train was the unit. The Court did not accept the contention of either party, but held that a penalty was recoverable for each act of confinement beyond the statutory period. It was said that where animals were loaded at the same time, and were unloaded at the same time, no matter whether consisting of one shipment or several, there was but a single act punishable as a single offense. The judgment of the Circuit Court of Appeals (**United States v. B. & O. R. R. Co., 159 Fed. 33**), which sustained the contention of the Government, was therefore reversed.

The reasoning of the Supreme Court is very persuasive under the Hours of Service Act. If there is but a single act punishable as a single offense when a number of cattle are loaded at the same time and unloaded at the same time, is it not also true that there is but a single act punishable as a single offense when a number of employes engaged on the same piece of work are required or permitted to begin service at the same time and quit at the same time?

The penalty under the Twenty-eight Hour Law is for "every such failure" to unload animals. The penalty under the Hours of Service Act is for "each and every violation" of its provisions. There is no difference between the meaning of these two terms. Under each a penalty is imposed for an act, and the act consists of the doing or the failure to do a particular thing. Un-

der neither is the number of violations fixed by the number of cattle or the number of employes involved.

Civil Cases in State Courts.

In the case of **The M. K. & T. Ry. Co. of Texas v. State, 97 S. W. 724,** the Court had under consideration what is commonly called the Texas Water Closet Statute, which required railroad companies to construct, maintain and keep in sanitary condition water closets for both male and female persons at each and every passenger station on their lines of railway, and which provided that any railway company "which fails, neglects or refuses to comply with the provisions of this act shall forfeit and pay to the State of Texas the sum of $100.00 for each week it so fails and neglects. The County Attorney of the county in which said station is located * * * shall * * * institute suit or suits in the name of the State * * * for the recovery of said penalty."

The defendant was charged with having failed to comply with this law at two stations in Rains County, Texas, for a period of twelve weeks. The trial court held that a penalty could be recovered for each station, but the Court of Civil Appeals declined to follow this holding. It said:

> "Considering the Act as a whole, it is clear that the penalty is imposed for the failure by railway

corporations to comply with its provisions in each county," and not at each station.

In **Porter v. Dawson Bridge Company, 157 Pa. St. 367,** under a statute of Pennsylvania providing a penalty against the bridge company for each overcharge of toll, collected or demanded, the plaintiff at one time paid tolls due for driving over the bridge at various times preceding payment. It was held that but one penalty was incurred, though the account paid embraced many times of overcharge.

In **Railroad Company v. Green, 86 Pa. St. 427,** the Court held that only one penalty could be recovered for the act of excluding two persons from a particular car of the railroad under a Pennsylvania statute, the exclusion of both being at the same time. The Act prohibited the exclusion of any person or persons on account of color or race from a car and gave a penalty of $500.00 to the person aggrieved. The plaintiff and his wife were excluded at one and the same time, and each sought to recover the penalty provided by the statute, but the Court held the act of exclusion single and allowed only one penalty.

In **Hill v. Williams, 14 Serg. & R. 287,** the father of the female brought suit and recovered the penalty provided by an act prohibiting clandestine marriages. Subsequently the father of the male brought his action to recover. A recovery was permitted in the trial court, but the Supreme Court of Pennsylvania reversed the

judgment, holding that the marriage was one act, for which but one penalty could be recovered.

People v. Spencer, 201 N. Y. 105, 94 N. E. 614, was a suit for penalties for a violation of a statute of New York, which prohibited the adulteration of vinegar, and also prohibited the false branding of each package containing vinegar. It was held that a penalty could be recovered for each falsely branded package, but that for adulteration only one penalty could be recovered for each act. The number of packages adulterated by one act, the Court ruled, was immaterial.

To the same effect are the following cases:

Sturgis v. Spofford, 45 N. Y. 446;
Fisher v. N. Y. C. & H. R. R. Co., 46 N. Y. 644;
Cox v. Paul, 175 N. Y. 328;
Griffin v. Interurban S. R. Co., 72 N. E. 513;
State Board of Pharmacy v. Bellinger, 138 App. Div. 12, 122 N. Y. S. 651;
Apothecaries Co. v. Jones (1893), 1 Queen's Bench 89;
Parks v. Railway Co. (Tenn.), 13 Lea 1;
Washburn v. McInroy, 7 Johns 134.

It is a general rule that cumulative penalties are not recoverable unless the legislative intent to impose them is clear (State v. Wis. C. R. R. Co., 133 Wis. 478). "Prosecutions for aggregated penalties are not to be encouraged" (Sturgis v. Spofford, 45 N. Y. 446). "The inclination of the courts against multiplying penalties is strong" (Railroad Co. v. Green, 86 Pa. St. 427). In

Griffin v. Interurban St. R. R. Co., 72 N. E. 513, it is said:

> "The Court is of opinion that if cumulative recoveries are to be permitted the Legislature should state its intention in so many words * * *. A sound public policy requires that only one penalty should be recovered in a single action and that the institution of an action for a penalty is to be regarded as a waiver of all previous penalties incurred."

Criminal Cases.

The principle here contended for is supported by an almost unbroken line of authority in criminal cases, which are instructive in this connection.

In 12 Cyc 289, it is said in the text:

> "Crimes are not usually identical if committed against different persons, but by the weight of authority where the same act or stroke results in the death of two persons an acquittal or conviction of the murder of one bars a subsequent prosecution for the killing of the other, because the killing is but one crime and cannot be divided. The rule also applies where the same blow produces a separate assault and battery on two different persons."

In 22 Cyc 383, the text reads:

> "A single act or transaction in violation of law may as a general rule be charged in one count as a

single offense, although the act involves several similar violations of law with respect to several different persons. Thus, when committed in the same act, larcenies from different individuals may be joined, or robberies of several persons at the same time and place, or the reception of stolen goods belonging to different owners, or a libel concerning several persons uttered by one publication of several obscene songs. So, too, the killing of more than one person resulting from the same felonious act may be averred in a single count, or a threat to kill, or an assault upon several at the same time, or a breach of the peace, or an attempt to kidnap."

In the notes a large number of cases are cited, there being only a very few instances of dissent.

In 25 Cyc 61, it is said in the last paragraph of the text:

"Even if several articles taken at substantially one time are taken from different persons, the act, according to the prevailing view, constitutes but a single theft, although in a few jurisdictions the taking at one time of several articles of different persons may be regarded either as one crime or as distinct crimes."

In 1 Bishop's New Criminal Law, Section 793, page 479, it is said:

"It is often a nice question whether or not a transaction is separable into more crimes than one, and what crimes."

The author then illustrates as follows:

> "A man may violate the prohibiting statute by 'exercising his ordinary calling' in a single act. Thereupon if he continues to perform like acts throughout the day does he commit more offenses than one? The judicial answer to this question is that he does not. For further example, a statute provides 'a fine for performing any worldly employment or business' on Sunday, and it was held that a person who keeps open his shop and makes successive sales to different persons throughout the same day subjects himself to but one fine."

See, also, Section 1061 of the same work.

In Bishop on Statutory Crimes (2nd ed.), Section 1121, it is said:

> "If a man overdrives or overloads two horses harnessed together, the wrong is evidently but one," citing People v. Tinsdale, 10 Abb. Pr. (N. S.) 374, and State v. Comfort, 22 Minn. 271.

In the case first cited the statute involved is quoted at page 376, and reads in part:

> "If any person shall * * * overload * * * any living creature, every such offender shall, for every such offense, be guilty of a misdemeanor."

The indictment was for overloading a passenger street car drawn by two horses. This the Court treated as one offense.

This principle has been applied in the following

cases, among others, in each of which the act, though involving two or more persons or things, was held to constitute a single offense:

Crepps v. Durden, Corop. 640 (laboring on Sunday);

Regina v. Giddens, Carrington & Mashman, 41 E. C. L. 344 (robbery);

Clem v. State, 42 Ind. 420 (murder);

Hoiles v. United States, 3 McArthur 370 (larceny);

United States v. Patty, 2 Fed. 664 (circulation of lottery circulars);

United States v. Scott, 74 Fed. 213 (soliciting funds for political purposes);

Hurst v. State, 86 Ala. 604 (aiding prisoners to escape from jail);

Ben v. State, 22 Ala. 9 (poisoning);

Westfall v. State, 62 S. E. 558 (running freight trains on Sunday);

Peck v. State, 111 S. W. 1019 (larceny);

Scott v. State, 81 S. W. 950 (assault);

State v. Warren, 39 Am. St. Rep. 401 (larceny);

State v. Nelson, 29 Me. 329 (receiving stolen goods);

Woodford v. People, 62 N. Y. 117 (arson);

Gordon v. State, 46 Ohio State 607 (unlawfully selling liquors).

As illustrative of the holdings in these cases: Westfall v. State, 62 S. E. 558, involved the running of six freight trains over a railroad on Sunday in violation of

a statute. It was held that this constituted but one offense.

If the running of six freight trains on Sunday under a statute making the running of such trains unlawful is but one offense, *a fortiori* the working of five employes engaged on the same piece of work at one and the same time is but a single offense.

See also:

Muckenfuss v. State, 55 Tex. Crim. 229;
State v. Hennessy, 25 Ohio St. 339;
Smith v. State, 59 Ohio St. 350;
State v. Egglesht, 41 Ia. 547;
Commonwealth v. Crowell (Ky.), 60 S. W. 179;
State v. Batson, 108 La. 479;
Ward v. State, 90 Miss. 294;
State v. Douglas, 26 Nev. 196;
People v. Thomas, 17 Wardell 475;
State v. Clark, 46 Ore. 140;
Cornell v. State, 104 Wis. 527;
State v. Stevens, 70 Atl. 1060.

The Expression of Penalties in Other Acts of Congress.

A consideration of other acts of Congress leads to the same conclusion. Had it been intended that a penalty should be incurred for each employe, Congress would have clearly so provided, as it did in other statutes.

Section 4 of an Act approved March 3, 1903, provides "that it shall be unlawful for any person * * * to assist or encourage the importation or migration of any

alien into the United States" under certain conditions.

Section 5 provides "that for every violation of any of the provisions of Section 4 of this Act" the person guilty "shall forfeit and pay for every such offense the sum of $1,000.00 * * * **and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid.**" (Bold-face type ours.)

Section 2 of the Accidents-Reports Act, approved May 6, 1910, provides that any common carrier failing to make the reports within the time prescribed "shall be punished by a fine of not more than $100.00 for each and every offense **and for every day during which it shall fail to make such report after the time herein specified for making the same.**" (Bold-face type ours.)

Section 20 of the Act to Regulate Commerce as amended June 24, 1906, provides that the carriers subject thereto shall make annual reports, and that if any carrier shall fail to make and file such reports within the time specified by the Interstate Commerce Commission it shall forfeit to the United States the sum of $100.00 **"for each and every day it shall continue to be in default with respect thereto."** (Bold-face type ours.)

This section further authorizes the commission to prescribe a system of accounts to be observed by the carriers and provides that in case of failure or refusal on the part of any carrier to comply with such requirements it shall forfeit to the United States "the sum of

$500.00 for each such offense **and for each and every day of the continuance of such offense.**" (Bold-face type ours.)

Section 6 of the Act to Regulate Commerce as amended June 18, 1910, provides that for a failure or refusal on the part of any common carrier to comply with the terms of any regulation adopted and promulgated by the Interstate Commerce Commission under said section the common carrier shall be liable to a penalty of $500.00 for each such offense and $125.00 **for each and every day of the continuance of such offense.**"

Other examples might be given, but these are sufficient. The absence of a provision in the Hours of Service Act expressly fixing a penalty for each employe or for each period of overtime is strong argument that Congress did not so intend.

If it were a matter of doubt whether a penalty can be recovered for each act or for each employe involved, the doubt should be resolved against the Government. The Act, while remedial in one sense, is penal in another, and no intention on the part of Congress to inflict penalties beyond that clearly expressed should be presumed. In other words, before a common carrier is held for a penalty for each employ it should be clear that such penalty is authorized.

But there is no room for doubt. In the light of the decision of this court in **B. & O. S. W. R. R. Co. v. United**

States, *supra*, of the rulings in the State civil cases referred to; of the holdings in the criminal cases cited; of the general rule with reference to the recovery of cumulative penalties; and of the practice of Congress in stating explicitly when a penalty can be recovered for each day, each employe, etc., it is clear that the Hours of Service Act imposes a penalty for each prohibited act done, and not for each employe involved in the commission of the act.

Respondent will probably cite in opposition to this conclusion cases arising under the Safety Appliance Acts. It will be noted, however, that the decisions under those acts which hold that a penalty can be recovered for each car or each engine handled in violation of the statute are by the Circuit Courts of Appeals and the District Courts. This Court has not passed upon the question, and possibly it would reach a different conclusion and overrule the holding of the Circuit Courts of Appeals, as it did in the B. & O. S. W. case involving the Twenty-eight Hour Law. It is to be further noted that in a case involving the violation of that provision of the Safety Appliance Acts which requires that 75% of the train be equipped with air brakes, the District Court for the Northern District of Iowa, in **United States v. Chicago Great Western Ry. Co., 162 Fed. 775,** held that, while as to cars and engines a penalty can be recovered for each car or engine, under this provision but one penalty can be re-

covered for each train, although cars be taken from or added to the train along the line, and there be more than the required number of cars equipped at some places and fewer than the required number at other places. But if the construction placed by the Circuit Courts of Appeals and the District Courts upon the Safety Appliance Acts be correct, for the reason previously stated, a different holding should be made under the Hours of Service Act.

It follows that petitioner's special exception embraced in the first assignment of error should have been sustained and that the Court erred in instructing the jury to return a verdict against petitioner on each count and in assessing a penalty for each count.

II.

A member of a train crew while not actually engaged in or having a duty to perform in connection with the movement of his train, his time being at his disposal, is off duty within the meaning of the Hours of Service Act.

It was admitted that the men involved in Cause No. 32 went on duty at 12:50 a. m., November 30th, and finally went off duty at 8:30 p. m. the same day. They were thus on duty nineteen hours and forty minutes, unless some off-duty time intervened. It is our contention that such off-duty time did intervene.

It appears without controversy that when the train reached Royse City the engine was detached, and, with the engineer, fireman and conductor thereon was run to Greenville for water. The two brakemen remained at Royse City while the engine was gone, a space of some three hours. During this time they were not engaged in the movement of the train and had no duty whatever to perform in connection with its movement (Rec., p. 28). The engine remained at Greenville one hour and thirty-five minutes, during which time the roundhouse force had charge of it, and the engineer, the fireman and the conductor had no control over it and no duty to perfom in connection with it (Rec., pp. 28 and 29). At the end of this period they took charge of the engine again and carried it back to Royse City, where it was coupled to the train, and they then returned to Greenville, arriving there at 12:30 p. m. and remaining until 3:50 p. m., waiting for repairs on the engine. During this period of three hours and twenty minutes the engine and train were in the hands of the yard crew, which does all the switching at Greenville. No member of the crew involved engaged in the movement or other handling of the engine or train during this period or had any duty to perform in connection with such movement or handling (Rec., p. 29). True, the periods of waiting were indefinite; that is, the brakemen did not know when the engine left Royse City how long it would be away, nor did the crew at

Greenville know how long they would have to wait for the return of the engine and train to them, and they were paid for this time. But they utilized the period of waiting as they thought best; the time was at their disposal (Rec., pp. 27-33), and their pay was a matter of contract and was not dependent upon the time on duty (Rec., p. 33).

If the brakemen were off duty at Royse City and if the crew were off duty at Greenville, there was no violation of the law, for excluding that time they were not required or permitted to remain on duty exceeding sixteen hours during the twenty-four-hour period.

The term "on duty" cannot be made plainer by discussion. The words speak for themselves. "Manifestly, however," as was said in the case of **United States v. Denver & Rio Grande R. R. Co., 197 Fed. 629,** "they mean to be actually engaged in work or to be charged with present responsibility for such, should occasion for it arise." In other words, an employe is "on duty" while actually working, or while at his post—ready to do whatever comes to hand.

In **Atchison, T. & S. F. R. Co. v. U. S., 177 Fed. 118** (it being the case afterwards reviewed by this Court in 220 U. S., 37), a telegraph operator worked from 6:30 a. m. to 6:30 p. m., with an intermission of three hours at noon. It was contended that the railway company was guilty of a violation of the nine-hour provision of

the Act involved in this case. The Court in denying that contention said:

> "The statute was passed with custom as a background. According to custom nine hours work unquestionably means nine hours actual employment, whether broken by an intermission for lunch or on account of some other occasion."

This expression, while in conflict with the views of Judge Rudkin expressed in **U. S. v. Chicago, M. & P. S. R. Co., 197 Fed. 627,** as to intermissions for meals, is, we submit, supported by the better reasoning.

We call attention here to the fact that under the Federal eight-hour law for laborers, the meal hour is never treated as time on duty.

Under the facts, it is clear that the brakemen were not on duty while at Royse City and that the crew were not on duty while at Greenville. Their business was to operate the train, and, in the language of the statute (Section 1), during these periods of waiting they were not "actually engaged in" the movement of the train nor were they "connected with the movement" thereof. This is the natural conclusion to be reached, and there is no authority justifying a different conclusion.

The following cases deal with the term, "on duty":

Atchison, T. & S. F. R. Co. v. U. S., 177 Fed. 118;
U. S. v. Illinois Central R. R. Co., 180 Fed. 630;
U. S. v. Chicago, M. & P. S. Ry. Co., 195 Fed. 183;
U. S. v. Kansas City So. R. Co., 189 Fed. 471;

U. S. v. Chicago, M. & P. S. Ry. Co., 197 Fed. 624;
U. S. v. D. & R. G. Ry. Co., 197 Fed. 629.

The holding in the **Atchison, T. & S. F. R. Co.** case has been sufficiently indicated above. The next two cases present the question whether members of a train crew who are required by the rules of the company to report a definite time before the departure of their train for the purpose of looking it over to see whether everything is in readiness, are on duty during this time. The question was answered in the affirmative. In the Kansas City Southern case it was held that a crew in charge of a train were on duty while waiting for a train to start. In the **Chicago, Milwaukee & Puget Sound** case, **197 Fed. 624,** it was held that employes were on duty during meal time and while waiting for a helper to assist in the movement of their train, although the train was in charge of a watchman during the meal hours, and they were relieved from duty until the helper arrived, the time of his arrival being uncertain. In the **Denver & Rio Grande** case it was held that a train crew waiting upon a siding for the arrival of another train were on duty. This case also involves preliminary time before the departure of the train.

What is the meal hour but an hour of rest? That is its purpose, and its only purpose.

Whether employes are on duty at a particular time is a question of fact, and each case must be decided upon its own facts. The cases involving the rule requiring

employes to report a definite period before the departure of their train are clearly distinguishable from the case at bar. So is the case involving delay waiting for the train to start from the terminal. The cases most nearly akin to the instant case are the last two mentioned. But they must be distinguished from it upon the facts; and, even if it were otherwise, the reasoning upon which they are based is clearly unsound.

Both of those cases are based upon the authority of **United States v. A. T. & S. F. Ry. Co., 220 U. S. 37.** That case, however, does not sustain the rulings in support of which it is cited. To begin with, that portion of the opinion relied upon was not necessary to a decision of the case. And aside from that the question there involved was entirely different from the one here under consideration. That question was whether requiring a telegraph operator to work five and one-half hours and, then after an interval of three hours, to work three and one-half more hours, in the same 24, violated the act and it was held that the period could be broken and need not be consecutive. The Atchison case, therefore, in so far as it is authority, supports our position and not that of the Government.

These cases refer to the further fact that the period off duty was indefinite. But clearly that cannot be material. Suppose at the end of sixteen consecutive hours of service an employe is told that it is not known when he will again be needed, but to rest until he is

called. If he should in fact not be called until after having had at least ten consecutive hours rest, would it be said that he had not been off duty during that time? Certainly not.

The time off duty might very well have been considered by Congress in fixing periods of rest. For instance, an employe working sixteen hours, with four "breaks" of one hour each, might need a longer rest than one working sixteen hours with one "break" ot four hours. But Congress did not consider it, and the Courts are not authorized to do it. The question in each case is whether there were periods of off duty. If there were such periods—whether long or short, whether definite or indefinite—they should be deducted in determining whether the employe has worked overtime.

The method used in determining a man's pay cannot effect the question much less control or decide it. The mere fact pay is based on **lapsed time** does not mean the employe is continuously on **duty**.

We repeat, the employes while waiting at Royse City and at Greenville were not on duty, and, deducting this time, the law was not violated.

III.

The failure of an injector, caused by impure water, where, owning to a protracted drouth, water cannot be procured that will not foam and thus cause injector failures, is an unavoidable accident within the meaning of the Hours of Service Act.

The crew involved in suit No. 34 went on duty at 6:15 p. m., November 11th, and finally came off duty at 12:05 p. m., November 12th. They were thus on duty seventeen hours and fifty minutes, or an hour and fifty minutes overtime. The delay causing this overtime was attributable to the failure of the injectors on the engine. Owing to the drouth then prevailing in Texas there was a scarcity of water, and petitioner was unable to get pure water for its engines. It had to use "anything that would boil," but it got the best water it could (Rec., p. 40). This impure water foamed, which made it necessary to use a compound. As a result of it injector troubles were of frequent occurrence. The engineer upon this occasion used the left injector to mix the compound and the right to water the engine. The left injector failed at or near Whitesboro; the right just after leaving Pottsboro, a station about eight miles from Denison. But for this last failure the crew could have made the terminal within the sixteen-hour period (Rec., pp. 33-40). Petitioner regularly inspected its engines, and both injectors on this engine were tested

before the train left Fort Worth and found to be in good condition (Rec., p. 38).

Section 3 of the Hours of Service Act contains this provision:

> "Provided, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employe at the time said employe left a terminal, and which could not have been foreseen."

An unavoidable accident, within the meaning of this proviso, we should say, is something happening without negligence on the part of the carrier and which it could not have guarded against. To change a little the definition of the term given by Judge Trieber in **U. S. v. Kansas City So. R. Co., 189 Fed. 471,** an unavoidable accident is an accident which could not have been foreseen, or, if foreseen, could not have been prevented, by the exercise of that degree of diligence which reasonable men would exercise under like conditions.

And this seems to be the rule as laid down in **U. S. v. Kansas City So. R. Co., 202 Fed. 828.**

The facts stated make an unavoidable accident within the meaning of this proviso. The drouth, which was at the bottom of the trouble, was, of course, an act of God. This made it necessary for defendant to use

impure water in its engines. It got the best water it could, but was unable to get water that would not foam, notwithstanding it used a compound to prevent this, and foaming water, the testimony shows, caused injector failures. It regularly inspected its engines, and both injectors were in good condition when the train left the terminal that morning. The record suggests no negligence on the part of defendant, and that which happened without its negligence should be held to be unavoidable.

Of course, knowing of the water trouble, petitioner had to take that fact into consideration in fixing its divisions, but there is nothing in the facts suggesting that its divisions were too long. On the contrary, it appears that they were sufficiently short. The distance between the terminals was only 96 miles, and the schedule time of the train was less than eight hours. The question arising under the facts, and which we now present, is, was that an unavoidable accident which petitioner was powerless to prevent? We assert that it was and that this takes the case out of the operation of the law.

IV.

Under the facts in each case the delay was the result of a cause not known to the defendant or its officer or agent in charge of the employes at the time they left the terminal, and which could not have been foreseen.

The proviso above quoted states that the act shall not apply in four classes of cases. It does not apply, first, in any case of casualty; second, in any case of unavoidable accident; third, in any case of the act of God; and, fourth, where the delay was the result of a cause not known to the carrier or its officer or agent in charge of the employes at the time they left a terminal, and which could not have been foreseen.

The fourth class of cases is broader than the other classes, and evidently was meant to include cases not coming within them. In other words, Congress did not intend that railroad companies should be penalized unless there was some wilfullness on their part in working their employes overtime.

There is nothing in this record suggesting any intention to violate the law or any wilful disregard of its provisions. The terminals in suit 32 were Dallas and Denison, and in suit 34, Fort Worth and Denison. The work of the crew involved in the first case was to operate a train 106 miles, the schedule time for which was eight hours and forty-five minutes, and in the other case to operate a train 96 miles, the schedule

time for which was seven hours and five minutes. The officer of petitioner in charge of the crews was the superintendent. The equipment was in good order when the first terminals were left, and, according to the testimony of the superintendent, which is not contradicted, there was nothing known to him when either crew left the terminal to indicate or cause him to believe that the other terminal would not be reached well within the sixteen hours. While each of the trains early had trouble, that is not a matter of consequence. These troubles were not known when the employes left the terminal (Rep., pp. 25 and 26). At that time the causes of the delays were unknown to the superintendent or to any other officer or agent of petitioner, and, under the circumstances, they could not have been foreseen. We submit, therefore, that, under these facts, the provisions of the law do not apply.

For this reason and for the reasons stated in subdivisions II and III of this argument, petitioner was entitled to an instructed verdict, and the Court erred in refusing its request therefor.

V.

Upon the request of either party the penalty to be assessed in a case arising under the Hours of Service Act should be submitted to the jury, even where the Court instructs a verdict for the Government.

Suits by the Government for penalties under the Hours of Service Act are actions at law for debt, and, as such, are civil suits.

Hepner v. U. S., 213 U. S. 103;
U. S. v. Atlantic C. L. R. Co., 182 Fed. 285;
U. S. v. St. Louis S. W. Ry. Co., 184 Fed. 32;
U. S. v. Sioux City Stock Yards Co., 167 Fed. 126;
U. S. v. Kansas City So. R. Co., 202 Fed. 828.

In a civil suit, where the damages or penalties are not made certain and fixed by the terms of a contract or statute, the Court, upon request, should submit to the jury the question of assessing the damages or penalties.

Renner v. Marshall, 1 Wheat. 215;
Aurora v. West, 7 Wall. 104;
Armstrong v. Carson, 2 Dall. 302;
Kenyon v. Gilmer, 131 U. S. 22;
Hines v. Darling (Mich.), 57 N. W. 1081;
McDaniel v. Gate City Gas Light Co. (Ga.), 3 S. E. 693.

In **Aurora v. West,** Justice Clifford, speaking for the Court, said:

"Where the sum for which judgment should be

rendered is uncertain, the rule in the Federal Courts is that the damages shall, if either of the parties request it, be assessed by a jury.

"But if the sum for which judgment should be rendered is certain, as where the suit is upon a bill of exchange or promissory note, the computation may be made by the Court, or what is more usual, by the clerk; and the same course may be pursued even when the sum for which judgment should be rendered is uncertain if neither party request the Court to call a jury for that purpose."

In **Hines v. Darling**, an action was brought to recover a penalty for wilfully obstructing a ditch under a statute providing a maximum penalty of $25.00 for such offense. The trial court directed a verdict in favor of the plaintiff for the penalty fixed by the statute. This the Supreme Court held to be error. While it was proper, the Court said, under the facts, to direct a verdict for the plaintiff, the question of penalties was for the jury.

In **McDaniel v. Gate City Gas Light Co.**, the question was whether the penalty, under a Georgia statute, which imposed a penalty of not exceeding $500.00 for a failure to make certain returns on bonds issued and put in circulation by corporations, should be fixed by the Court or the jury. In disposing of it the Court said:

"As the Act does not point out whether the Court is to fix the penalty prescribed by the third section, or whether the jury is to fix it, we think

that the amount of the penalty is a question for the jury to decide, under all the facts and circumstances of the case. The defendant may submit evidence to show good faith in having issued the bonds without having made a return to the Secretary of State; it may show that it did so in ignorance; it may show that as soon as it was ascertained what the law was it made a return to the Secretary of State,—and these things may be taken into consideration by the jury, under proper instructions from the Court, and the jury may find against the defendant, and assess the penalty, whether $100 or $500."

The Circuit Court of Appeals, therefore, should have sustained the third and fourth assignments of error.

VI.

In a consolidated cause, involving two suits of five counts each, where in any event but one penalty can be recovered in each case, it is plain error for the Court to instruct the jury to find against defendant on each count and to assess a penalty on each count.

For the reasons stated under the first subdivision of this argument petitioner, in any event, is liable for only one penalty in each case. The trial court instructed the jury to find against it on each of the five counts in each case, and assessed a penalty on each count. Its action

in so doing is such fundamental error as the Court will consider without an assignment.

U. S. v. T. & C. R. Co., 176 U. S. 242;
U. S. v. Penna., 175 U. S. 500;
School District v. Hall, 106 U. S. 428.

VII.

In conclusion, we contend:

First. That while the act is remedial and should be liberally construed to accomplish the purpose of its passage, it should not be so construed as to make it burdensome to the carriers; and that in no case should a carrier be penalized unless the record discloses a willful violation of the law or a course of conduct which amounts to a disregard of its provisions.

Second. That where the carrier does not know, when the employe leaves a terminal, of any cause that will prevent his reaching the next terminal within the time allowed, and, under the circumstances, should not foresee such contingency, to require or permit him to work more than sixteen hours in reaching the terminal does not violate the law, whether a casualty, an unavoidable accident, or an act of God be encountered or not; and even though, after the employe leaves the first terminal, facts become known to the carrier which indicate that the employe cannot reach the terminal without exceeding the hours prescribed.

Third That an injector failure which the carrier is

powerless to prevent, is an unavoidable accident within the meaning of the act.

Fourth. That members of a train crew, while their time is at their own disposal and they are not engaged in, and have no duty to perform connected with, the movement of their train, are off duty, whether such time be definite or indefinite.

Fifth. That a violation of the act consists of requiring or permitting an employe or employes to be or remain on duty over time, and that the number of employes involved is wholly immaterial in determining the number of violations.

Sixth. That if a train crew of five members, who go on duty at the same time and off duty at the same time, are required or permitted to work longer than sixteen hours, there is but one violation of the law; and,

Seventh. That under the Act, where either party requests it, even if a verdict be instructed for the Government, the question of the penalty to be inflicted is one for the jury.

Respectfully submitted,

ALEXANDER S. COKE,

A. H. McKNIGHT,

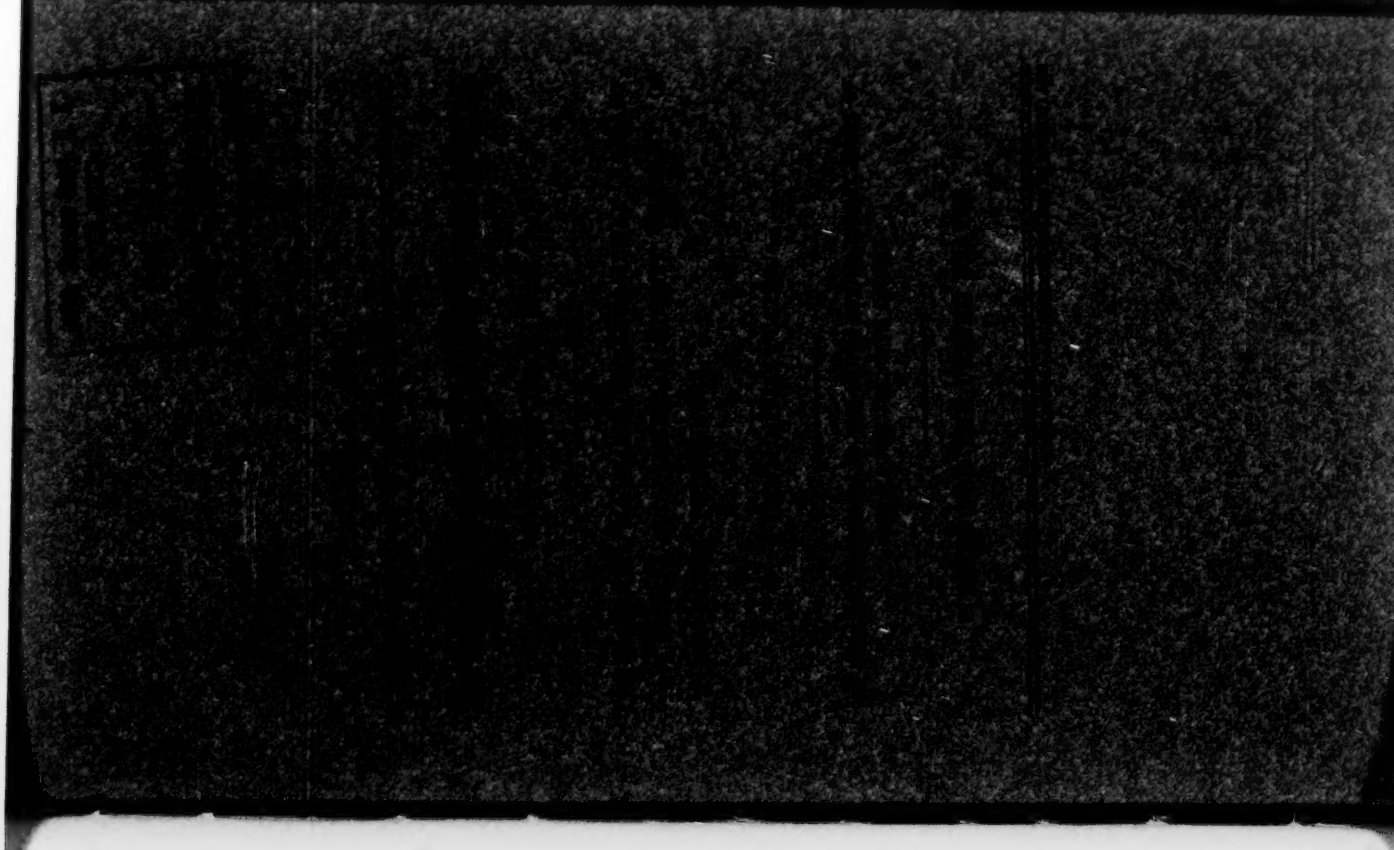
HEAD, SMITH, HARE, MAXEY & HEAD,

Attorneys for Petitioners.

JOSEPH M. BRYSON,

CECIL H. SMITH,

Of Counsel.



INDEX.

CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, and AMERICAN SURETY COMPANY OF NEW YORK, petitioners,

v.

THE UNITED STATES.

No. 439.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

FIRST POINT.

The question whether separate penalties are to be imposed for every employee who is worked over hours is exclusively a question of construction of the statute involved, and this statute clearly so intends.

The questions arise under the hours-of-service act of March 4, 1907 (34 Stat. L., 1415), the pertinent portions of which are quoted at the appropriate point in the argument.

There is no claim that any constitutional obstacle exists to prevent Congress from imposing, if it so desires, a separate penalty for every employee subjected to overwork and making each single employee a unit of the offense. (Cf. *O'Neil* v. *Vermont*, 144 U. S., 323, 331.)

It is, therefore, exclusively a question of construction of the particular act.

This act seems, in plain terms, to require the decision below and the uniform practice of the other trial courts, including the cases reported in—

United States v. *Chicago, etc., R. Co.*, 197 Fed., 624.

United States v. *Denver & R. G. R. Co.*, ib., 629.

The pertinent provision of the act is as follows (italics ours):

> SEC. 1. * * * the term "employees" as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.
>
> SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit *any* employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever *any* such employee of such common carrier shall have been continuously on duty for sixteen hours, *he* shall be relieved, and not required or permitted again to go on duty, until *he* has had at least ten consecutive hours off duty; and *no* such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to con-

> tinue or again go on duty without having had at least eight consecutive hours off duty. * * *
>
> SEC. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting *any* employee to go, be or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars *for each and every violation*, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed; * * *.

This chosen language would have to be strained pretty seriously to make it fit the petitioner's construction.

It does not say "its employees," nor does it say "any train crews," nor does it say "the employees on any train," which would express the meaning petitioner seeks to give it. On the contrary, it explicitly directs its application to abuse of individual employees.

The purposes of Congress, so far from compelling such liberties with its words, rather compel their literal application. The primary purpose is to protect the public against the risk of accident due to exhaustion of any employee engaged in or connected with the movement of any train. The exhaustion of every separate employee, even in connection with the same train, subjects the passengers to a peculiar and separate risk, each having his own peculiar and

separate function to perform. Exhaustion of an engineer subjects the train to one type of risk; exhaustion of the dispatcher to another; exhaustion of the conductor to another; exhaustion of a flagman to another; and so on. They accumulate. A train with one exhausted employee becomes subject to different and added danger with every additional exhausted employee engaged in or connected with its movement.

Thus this evil aimed at by the act is hit only by the literal construction of its language.

The other purpose is to protect the employees themselves from abuse, and this, of course, is concerned with the individual himself.

B. & O. S. W. R. R. Co. v. *United States* (220 U. S., 94), which is chiefly relied on by petitioner, depended upon a statute (the 28-hour law, 34 Stat., 607) built on a totally different plan and requiring a totally different construction. This statute said (italics ours):

> SEC. 1. That no railroad * * * whose road forms any part of a line of road over which *cattle* * * * *or other animals* shall be conveyed * * * [in interstate commerce] * * * shall confine *the same* in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading *the same* in a humane manner, into properly equipped *pens*, for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by unavoidable causes.

> SEC. 2. That *animals* so unloaded shall be properly fed and watered during such rest * * *.
>
> SEC. 3. That any railroad * * * who knowingly and wilfully *fails to comply* with the provisions of the two preceding sections shall for *every such failure* be liable for and forfeit and pay a penalty of not less than one hundred dollars nor more than five hundred dollars.

This deals with "cattle" in a lump (whatever "animals" may be ripe for unloading). The unit of offense it created was the failure to unload whatever "cattle * * * or other animals" had been confined more than twenty hours. Of course, it *could* have made the failure to unload each steer the unit for the penalty, but obviously it did not do that and no one claimed it did.

People v. *Spencer* (201 N. Y., 105), which is stated on page 47 of petitioner's brief, illustrates in a single case the distinction between the case at bar and the 28-hour-law case. That was a suit for penalties under two different clauses of a statute. The first clause was similar to the 28-hour law, and prohibited the adulteration of vinegar, and as to this, as in *B. & O. Sw. R. Co.* v. *United States, supra*, only one penalty was allowed for each act of adulteration, no matter how many packages it covered. The second clause was similar to this hours of service law, and prohibited the false branding of each package containing vinegar; and as to this, as in the court below in the case at bar, a penalty was allowed for each package.

The Safety Appliance Act is somewhat analogous to this act. It provides that "it shall be unlawful for any such common carrier to *haul* * * * *any car* * * * not equipped with," etc., and that "any such common carrier * * * hauling * * * any car in violation of * * * this act shall be liable to a penalty of one hundred dollars *for each and every such violation.*" Under this provision the Court of Appeals for the Fifth Circuit held (*United States* v. *St. Louis Southwestern R. Co.*, 184 Fed., 28) that there was a separate violation as to each of the three cars moved though they were in one train and one movement.

In another case under this act (*United States* v. *Chicago Great Western Ry. Co.*, 162 Fed., 775, Dist. Ct. U. S. Iowa), there appears the same distinction as that drawn in *People* v. *Spencer, supra.* The court held that under the clause concerning the hauling of "any car" not equipped, etc., a penalty was imposed for every car; but that under the clause requiring that 75 per cent of the train be equipped with air brakes only one penalty was imposed per train. (See the case stated in petitioner's brief, pp. 55–56.)

In *People* v. *N. Y. Central R. Co.* (13 N. Y., 78) the statute required railroad trains to signal at crossings and fixed a penalty "for every neglect of this provision." It was held that a separate offense occurred at every crossing, even though on a single train journey.

In *Chic. & c., R. Co.* v. *People* (82 Ill. App., 679) the statute prohibited the obstruction of a highway and fixed a penalty "for each such offense." A single train extended across and obstructed several highways. It was held a separate offense for each such highway, because the statute contemplated the protection of each highway.

In *So. R. Co.* v. *State* (165 Ind., 613) the statute required the railroad company to register on a station blackboard the time of expected arrival of the trains at that station, and fixed a penalty "for each such violation." It was held a separate offense for every train as to the arrival of which item was not made.

In *Commonwealth* v. *Jay Cooke et al.* (50 Pa. State, 201) the statute said, "Every banker or broker who shall neglect or refuse to make *the return and report* required by the first and second sections of this act shall for *every such neglect* be subject" to the penalty. Cooke was held liable as for two distinct offenses, (1) the failure to make the return which was required by the first section and (2) the failure to make the report which was required by the second section.

Thus, as I have said, it is all a question of the construction of the particular statute, and the literal construction of this one accords with its reasonable purpose, and creates no legal anomaly.

SECOND POINT.

The crew of train No. 622 (suit No. 32 below) were "on duty" within the meaning of the act 19 hours and 40 minutes.

This point relates only to the penalties imposed under No. 34, which was the second of the two cases consolidated below.

The gross time between the going on duty of the train crew of train No. 622 and their final coming off is conceded to have been 19 hours and 40 minutes. (Petitioner's brief, p. 56.) But for the reasons stated by counsel at page 57, and by the trial court (Tr., p. 44) it is claimed the service was not "continuous" and that off-duty time intervened. The facts are clearly given by Kyle, the conductor. (Tr., pp. 27–28.)

The proposition is (Petitioner's brief, p. 57) that, (1) when an engine goes short of water and is cut off and run somewhere for a fresh supply, the brakemen left behind to wait with the train for the return of the engine are not "on duty" within the meaning of the act; and (2) that when an engine, in the midst of its trip, has to be taken to a roundhouse for repairs, the the engineer and fireman and conductor who accompany it are not "on duty" while waiting upon the repair work.

These periods of waiting were indefinite and the men did not know when they would terminate. (Brief, p. 57.)

The conductor testified that he drew pay for 19 hours and 40 minutes (p. 32).

The pertinent portions of the statute (sec. 2) are quoted above under the first point. The language does not give any real basis for the claim. Counsel bases an argument on section 1, which defines the "employees" referred to in the act as those "actually engaged in or connected with the movement of the train," contending that during these periods of waiting the crew were not so engaged or connected.

The construction is excessively narrow and out of harmony with the spirit of the act, and for this reason it has been rejected by all the courts to which it has been advanced.

United States v. *Chi. M. & P. S. Ry. Co.*, 197 Fed. 624.

United States v. *Denver & Rio Grande R. Co.*, ib. 629.

United States v. *Kan. City Southern Ry. Co.*, 189 Fed. 471.

United States v. *St. L. Southwestern R. Co.*, 189 Fed. 954.

United States v. *Ill. Cent. R. Co.*, 180 Fed. 630.

United States v. *C. M. & P. S. R. Co.*, 195 Fed. 783.

In the *Denver & Rio Grande* case it was claimed that a wait of 55 minutes on a siding to allow a train to pass should be deducted; but the court pointed out that the men were responsible for the train (as they were here), were uncertain as to their time (as they were here), were on pay (as they were here), and were without real opportunity to rest (as they were here).

These men had no real *relief* from duty, no real *freedom*—which is what the statute has in mind. They could not get any fair chance for recreation and rest under such conditions.

As well might it be attempted to deduct the sum total of cat naps an engineer could snatch while waiting in his seat in his cab on sidings at odd and indefinite times.

It was well put in *United States* v. *Chicago M. & P. S. Ry. Co., supra*, at p. 628, as follows:

> The facts in relation to the twenty-second and five succeeding counts are as follows: The train crew in question ran from Seattle to Laconia, and on the 16th day of June, 1911, left the former station at about 1.30 a. m. At some point on the line they were to be met by a helper to assist them up the mountain grade. They arrived at the point where the helper was to join them at 9.55 a. m. Upon their arrival there the helper was delayed for some cause, and the train master or some officer of the railway company immediately relieved the crew from duty until the helper should arrive. This, as it afterwards transpired, was a period of about three hours, or not until 1 o'clock p. m. The crew then proceeded upon its way and arrived at its destination at about 7.25 p. m. If the three hours' lay-off is deducted from the time of service, the crew was not employed for 16 consecutive hours; but, if not so deducted, the time of service exceeded that limited by law. If this crew had been laid off for a definite period of three hours at a terminal or other place where the crew might rest, such lay-off would no doubt break the continuity of the service. *Atchison case* (220 U. S., 37). But such was not the case here. The crew was laid off for an indefinite period, awaiting the arrival of a

delayed engine. They did not know at what moment the train might move, and had no place to go except to a bunk house or remain in the caboose. They chose the latter course. This, in my opinion, was a trifling interruption.

The facts in this case demonstrate the absurdity of the company's claim. According to its view of the law, it may work its employees for the full period of 16 hours, allow them 2 hours and 45 minutes off for their meals, lay them off for 3 hours at a siding in the mountains to wait for a helper, and thus leave them 2 hours and 15 minutes for sleep and recreation. Such a policy would illy protect the safety of either the employees or the traveling public. I therefore adjudge the defendant guilty as to these six counts also.

THIRD POINT.

The cause of the delay to train No. 404 (suit No. 34 below) was not within the exception.

This point relates only to the penalties imposed in case No. 34, which was the second of the two cases consolidated below.

The clause of the statute sought to be applied is as follows:

> *Provided*, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God, nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: *Provided, further*, That the provisions of this act shall not apply to the crews of wrecking or relief trains.

The trial court's charge states and disposes of the point as follows:

> Another excuse offered is that the train was delayed three hours in order to go from Royce City to Greenville for water, and it was stated that there had been in this country a very great scarcity of water for quite a while, and it appears that the only water station at which the supply could be replenished after leaving Dallas was Greenville. The defendant company knew that fact, knew there was no water at Royce City, and that the engine could not procure water anywhere after leaving Dallas until it reached Greenville, and, therefore, if one water car was not sufficient, they should have attached two or whatever number was necessary to supply the engine until it reached Greenville, and I don't think that excuse falls within the proviso attached to the act.

See as to other similar provisions, *Gleeson* v. *Virginia Midland R. Co.* (140 U. S., 435)—landslide caused by heavy rain not beyond prediction is not "act of God"; and to the same effect, *The Majestic* (166 U. S., 375, 386); and as to "extraordinary emergency," see *United States* v. *Garbish* (222 U. S., 257).

FOURTH POINT.

The size of the penalty (within the maximum) was a question for the court and not for the jury.

This statute does not fix the amount absolutely, but provides for "a penalty of not to exceed five hundred dollars."

It is claimed that the amount of the penalty was for the jury.

Of the cases cited by the petitioner (brief, p. 68), none support this proposition except *Hines* v. *Darling* (Mich., 57 N. W., 1081) and *McDaniel* v. *Gate City Co.* (Ga., 3 S. E., 693); the others were ordinary civil suits for debts or damages.

The contrary seems to have been the uniform practice in the Federal courts:

United States v. *Atlantic Coast Line*, 173 Fed., 764, 771 (C. C. A., 4th C.).

A. T. & S. F. Ry. Co. v. *United States*, 178 Fed., 12 (C. C. A., 8th C.).

M. K. & T. Ry. Co. v. *United States*, ib., 15 (C. C. A., 8th C.).

United States v. *Southern Pacific Co.*, 162 Fed., 412.

Same v. *Same*, 157 Fed., 459.

United States v. *Boston & Albany R. Co.*, 15 Fed., 209, 212.

These penalty actions have a mixed character. Their procedure is civil (*Hepner* v. *United States*, 213 U. S., 103; *C., B. & Q. R. Co.* v. *United States*, 220 U. S., 559), and they partake of a remedial character to some extent, especially in the *qui tam* form (*O'Connell* v. *O'Leary*, 145 Mass., 311, 312), but their object is chiefly to punish, and in that they are penal (*Lees* v. *United States*, 150 U. S., 476, and *Boyd* v. *United States*, 116 U. S., 616). This mixed character was explained by the court, in construing the safety

appliance act, in *Johnson* v. *Southern Pacific Co.* (196 U. S., 1):

> The primary object of the act was to promote the public welfare by securing the safety of employees and travelers, and it was *in that aspect remedial*, while for violations a *penalty* of one hundred dollars, recoverable in a civil action, was provided for, *and in that aspect it was penal*. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs, that rule not requiring absolute strictness of construction (p. 17).

And in *O'Connell* v. *O'Leary*, *supra*, Mr. Justice Holmes said:

> * * * There is no reason for making such an attempt in an action for money, which is so far remedial that it is given by or on behalf of a person aggrieved, *even though the sum sued for is a penalty. A penal statute imposing a forfeiture may be remedial in a certain sense* (p. 312).

The same idea appears in *United States* v. *Zucker* (161 U. S., 475, at 481):

> * * * whereas an action, in which a judgment for money only is sought, even if, in some respects, it is one of a penal nature, may be brought wherever the defendant is found and is served with process, unless some statute requires it to be brought in a particular jurisdiction.

Of course penalties and forfeitures are punitive, as the words themselves imply and as the above cases recognize, and it follows that the assessment is for the court and not for the jury.

Upon what basis is such a question to be left to the jury? It does not depend upon proof of damages nor involve the measuring of damages. It rests upon no evidence. The considerations which control its determination are the same as those which control the imposition of any other penal inflictions, and such have always been for the court. They involve a judicial discretion identical with that involved in the judicial assessment of punishment in the ordinary straight-out criminal cases.

CONCLUSION.

The judgment should be affirmed.

WINFRED T. DENISON,
Assistant Attorney General.

OCTOBER, 1913.

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No. [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1917.

THE MISSOURI, KANSAS & TEXAS RAILWAY CO. OF TEXAS AND THE AMERICAN SURETY CO. OF NEW YORK, PETITIONERS,

v.

UNITED STATES OF AMERICA.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

WASHINGTON : GOVERNMENT PRINTING OFFICE : [illegible]

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE MISSOURI, KANSAS & TEXAS RAILWAY Co. of Texas and the American Surety Co. of New York, *petitioners*, v. UNITED STATES OF AMERICA. } No. 942.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION TO ADVANCE.

The Attorney General, on behalf of the United States, moves the court to advance the above-entitled cause for hearing at the October, 1913, term of court.

This is a civil suit for penalties for violation of the hours of service act (act of March 4, 1907, 34 Stat., 1415), filed February 1, 1912, in the District Court for the Eastern District of Texas. Judgment in favor of the Government was rendered in the District Court, and this judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit. Petition for a writ of certiorari was granted by this court March 3, 1913.

The questions in this case involve the determination of the effect of delays of trains from causes of usual and ordinary occurrence in railroad operation, such as delay in meeting other trains, delay to repair engine defects, and also delay from scarcity or bad quality of water for engine use, as an excuse to carriers for the employment of train and enginemen for a longer period than that allowed by the hours of service act, in view of the proviso in section three of said act which relieves the carrier in case of casualty, unavoidable accident, or the act of God.

In view of the fact that numerous cases involving similar questions are constantly arising, it is respectfully requested that this case be advanced for early hearing at the October, 1913, term of court.

Opposing counsel concur in this motion.

J. C. McREYNOLDS,
Attorney General.

J. A. FOWLER,
Assistant to the Attorney General.

MAY 26, 1913.

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MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 439. Submitted October 24, 1913.—Decided November 10, 1913.

Under the Hours of Service Act of March 4, 1907, c. 2939, 34 Stat. 1415, when several employés are kept on duty beyond the specified time of sixteen hours, a separate penalty is incurred for the detention of each employé although by reason of the same delay of a train.

Each overworked railroad employé presents towards the public a distinct source of danger.

The wrongful act under the statute is not the delay of the train but the retention of the employé; and the principle that under one act having several consequences which the law seeks to prevent there is but one liability attached thereto does not apply.

An employé, who is waiting for the train to move and liable to be called and who is not permitted to go away, is on duty under the Hours of Service Act.

The penalty under the Hours of Service Act, not being in the nature of compensation to the employé but punitive and measured by the harm done, is to be determined by the judge and not by the jury.

THE facts, which involve the construction of the Hours of Service of Railway Employés Act, are stated in the opinion.

Mr. Joseph M. Bryson, Mr. Cecil H. Smith, Mr. Alexander S. Coke, Mr. A. H. McKnight for petitioners:

The Hours of Service Act imposes a penalty for each act of requiring or permitting employés to work overtime, whether one or more employés be involved, and not a penalty for each employé required or permitted to work beyond the hours prescribed.

While it is clear that a penalty can be recovered for each and every violation, what constitutes a violation is the question at issue.

While in *United States* v. *Chicago, M. & P. S. Ry. Co.*, 197 Fed. Rep. 624, and *United States* v. *Denver & R. G. Ry. Co.*, 197 Fed. Rep. 629, the trial court imposed a penalty for each member of a train crew, in none of them was the question of the right to impose a penalty for each employé discussed.

In *B. & O. S. W. R. R. Co.* v. *United States*, 220 U. S. 94, reversing 159 Fed. Rep. 33, it was held that under the Cruelty Act a penalty was recoverable for each act of confinement beyond the statutory period.

For civil cases involving recovery of more than one penalty in state courts, see *M., K. & T. Ry. Co.* v. *State*, 97 S. W. Rep. 724; *Porter* v. *Dawson Bridge Co.*, 157 Pa. St. 367; *Railroad Co.* v. *Green*, 86 Pa. St. 427; *Hill* v. *Williams*, 14 Serg. & R. 287; *People* v. *Spencer*, 201 N. Y. 105; *S. C.*, 94 N. E. Rep. 614; *Sturgis* v. *Spofford*, 45 N. Y. 446; *Fisher* v. *N. Y. Cent. R. R. Co.*, 46 N. Y. 644; *Cox* v. *Paul*, 175 N. Y. 328; *Griffin* v. *Interurban S. R. Co.*, 72 N. E. Rep. 513; *State Board* v. *Bellinger*, 138 App. Div. 12; *Apothecaries Co.* v. *Jones*, L. R. 1893, 1 Q. B. 89; *Parks* v. *Railway Co.* (Tenn.), 13 Lea, 1; *Washburn* v. *McInroy*, 7 Johns. 134.

Cumulative penalties are not recoverable unless the legislative intent to impose them is clear. *State* v. *Wis. C. R. R. Co.*, 133 Wisconsin, 478.

As to the rule in criminal cases, see 12 Cyc. 289, 383; 25 Cyc. 61; 1 Bishop's New Crim. Law, §§ 793, 1061; Bishop on Stat. Crimes (2d ed.), § 1121, citing *People* v.

Tinsdale, 10 Abb. Pr. (N. S.) 374; *State* v. *Comfort*, 22 Minnesota, 271.

For cases in which the act, though involving two or more persons or things, was held to constitute a single offense, see *Crepps* v. *Durden*, Cowp. 640; *Regina* v. *Giddens*, 41 E. C. L. 344; *Clem* v. *State*, 42 Indiana, 420; *Hoiles* v. *United States*, 3 McArthur, 370; *United States* v. *Patty*, 2 Fed. Rep. 664; *United States* v. *Scott*, 74 Fed. Rep. 213; *Hurst* v. *State*, 86 Alabama, 604; *Ben* v. *State*, 22 Alabama, 9; *Westfall* v. *State*, 62 S. E. Rep. 558; *Peck* v. *State*, 111 S. W. Rep. 1019; *Scott* v. *State*, 81 S. W. Rep. 950; *State* v. *Warren*, 39 Am. St. Rep. 401; *State* v. *Nelson*, 29 Maine, 329; *Woodford* v. *People*, 62 N. Y. 117; *Gordon* v. *State*, 46 Oh. St. 607.

The working of five employés engaged on the same piece of work at one and the same time is but a single offense. *Muckenfuss* v. *State*, 55 Tex. Crim. 229; *State* v. *Hennessy*, 25 Oh. St. 339; *Smith* v. *State*, 59 Oh. St. 350; *State* v. *Egglesht*, 41 Iowa, 547; *Commonwealth* v. *Crowell* (Ky.), 60 S. W. Rep. 179; *State* v. *Batson*, 108 Louisiana, 479; *Ward* v. *State*, 90 Mississippi, 294; *State* v. *Douglas*, 26 Nevada, 196; *People* v. *Thomas*, 17 Wardell, 475; *State* v. *Clark*, 46 Oregon, 140; *Cornell* v. *State*, 104 Wisconsin, 527; *State* v. *Stevens*, 70 Atl. Rep. 1060.

A consideration of other acts of Congress leads to the same conclusion. Had it been intended that a penalty should be incurred for each employé, Congress would have clearly so provided, as it did in other statutes. See §§ 4, 5, of the Alien Immigration Act of March 3, 1903; § 2 of the Accidents Reports Act of May 6, 1910; § 20 of the Act to Regulate Commerce as amended June 24, 1906; § 6 of the Act to Regulate Commerce as amended June 18, 1910.

Cases arising under the Safety Appliance Acts holding that a penalty can be recovered for each car or each engine handled in violation of the statute are by the Circuit

Courts of Appeals and the District Courts, and this court has not passed upon the question. It may reach a different conclusion. See *United States* v. *Chi. G. W. Ry. Co.*, 162 Fed. Rep. 775.

A member of a train crew while not actually engaged in or having a duty to perform in connection with the movement of his train, his time being at his disposal, is off duty within the meaning of the Hours of Service Act.

The term "on duty" cannot be made plainer by discussion. *United States* v. *Denver & R. G. R. R. Co.*, 197 Fed. Rep. 629; *Atchison &c. Ry. Co.* v. *United States*, 177 Fed. Rep. 118; *S. C.*, 220 U. S. 37; but see *United States* v. *Chi., M. &c. R. Co.*, 197 Fed. Rep. 627.

Under the Federal eight-hour law for laborers, the meal hour is never treated as time on duty.

During periods of waiting brakemen are not actually engaged in the movement of the train nor are they connected with the movement thereof. *Atchison, T. & S. F. R. Co.* v. *United States*, 177 Fed. Rep. 118; *United States* v. *Illinois Central R. R. Co.*, 180 Fed. Rep. 630; *United States* v. *Chicago, M. & P. S. Ry. Co.*, 195 Fed. Rep. 183; *United States* v. *Kansas City So. R. Co.*, 189 Fed. Rep. 471; *United States* v. *Chicago, M. & P. S. Ry. Co.*, 197 Fed. Rep. 624; *United States* v. *D. & R. G. Ry. Co.*, 197 Fed. Rep. 629.

The failure of an injector, caused by impure water, where, owing to a protracted drouth, water cannot be procured that will not foam and thus cause injector failures, is an unavoidable accident within the meaning of the Hours of Service Act.

As to what is an unavoidable accident within the meaning of this proviso, see *United States* v. *Kansas City So. R. Co.*, 189 Fed. Rep. 471; *S. C.*, 202 Fed. Rep. 828.

Under the facts in these cases the delay was the result of a cause not known to the defendant or its officer or agent

in charge of the employés at the time they left the terminal, and which could not have been foreseen.

Upon the request of either party the penalty to be assessed in a case arising under the Hours of Service Act should be submitted to the jury, even where the court instructs a verdict for the Government.

Suits by the Government for penalties under the Hours of Service Act are actions at law for debt, and, as such, are civil suits. *Hepner* v. *United States*, 213 U. S. 103; *United States* v. *Atlantic C. L. R. Co.*, 182 Fed. Rep. 285; *United States* v. *St. Louis S. W. Ry. Co.*, 184 Fed. Rep. 32; *United States* v. *Sioux City Stock Yards Co.*, 167 Fed. Rep. 126; *United States* v. *Kansas City So. R. Co.*, 202 Fed. Rep. 828.

In a civil suit, where the damages or penalties are not made certain and fixed by the terms of a contract or statute, the court, upon request, should submit to the jury the question of assessing the damages or penalties. *Renner* v. *Marshall*, 1 Wheat. 215; *Aurora* v. *West*, 7 Wall. 104; *Armstrong* v. *Carson*, 2 Dall. 302; *Kenyon* v. *Gilmer*, 131 U. S. 22; *Hines* v. *Darling*, 57 N. W. Rep. 1081; *McDaniel* v. *Gate City Gas Light Co.*, 3 S. E. Rep. 693.

In a consolidated cause, involving two suits of five counts each, where in any event but one penalty can be recovered in each case, it is plain error for the court to instruct the jury to find against defendant on each count and to assess a penalty on each count. *United States* v. *T. & C. R. Co.*, 176 U. S. 242; *United States* v. *Pennsylvania*, 175 U. S. 500; *School District* v. *Hall*, 106 U. S. 428.

Mr. Assistant Attorney General Denison for the United States:

The question whether separate penalties are to be imposed for every employé who is worked over hours is exclusively a question of construction of the statute involved, and this statute clearly so intends. Hours of

Service Act, 34 Stat. 1415; Twenty-Eight-Hour Law, 34 Stat. 607; *Baltimore & Ohio R. R. Co.* v. *United States*, 220 U. S. 94; *Chicago &c. R. R. Co.* v. *People*, 82 Ill. App. 679; *Commonwealth* v. *Jay Cooke*, 50 Pa. St. 201; *O'Neil* v. *Vermont*, 144 U. S. 323; *People* v. *Spencer*, 201 N. Y. 105; *People* v. *New York Cent. R. Co.*, 13 N. Y. 78; *Southern Ry. Co.* v. *State*, 165 Indiana, 613; *United States* v. *Chicago &c. R. Co.*, 197 Fed. Rep. 624; *United States* v. *Denver & R. G. R. Co.*, 197 Fed. Rep. 629; *United States* v. *St. Louis S. W. R. Co.*, 184 Fed. Rep. 28; *United States* v. *Chicago G. W. Ry. Co.*, 162 Fed. Rep. 775.

The train crew in this case were "on duty," within the meaning of the act, 19 hours and 40 minutes. *United States* v. *C., M. & P. S. R. Co.*, 195 Fed. Rep. 625; *United States* v. *Denver & R. G. R. Co.*, 197 Fed. Rep. 629; *United States* v. *C., M. & P. S. R. Co.*, 195 Fed. Rep. 783; *United States* v. *Kan. City Ry. Co.*, 189 Fed. Rep. 471; *United States* v. *St. Louis S. W. R. Co.*, 189 Fed. Rep. 954; *United States* v. *Ill. Cent. Ry. Co.*, 180 Fed. Rep. 630.

The cause of the delay to train No. 404 was not within the exception. *Gleeson* v. *Virginia Midland R. Co.*, 140 U. S. 435; *The Majestic*, 166 U. S. 375; *United States* v. *Garbish*, 222 U. S. 257.

The size of the penalty (within the maximum) was a question for the court and not for the jury. *Atchison &c. Ry. Co.* v. *United States*, 178 Fed. Rep. 12; *Boyd* v. *United States*, 116 U. S. 616; *Chi., B. & Q. R. Co.* v. *United States*, 220 U. S. 559; *Hepner* v. *United States*, 213 U. S. 103; *Hines* v. *Darling*, 57 N. W. Rep. 1081; *Johnson* v. *So. Pac. Co.*, 196 U. S. 1; *Lees* v. *United States*, 150 U. S. 476; *Missouri, K. & T. Ry. Co.* v. *United States*, 178 Fed. Rep. 15; *McDaniel* v. *Gate City Co.*, 3 S. E. Rep. 693; *O'Connell* v. *O'Leary*, 145 Massachusetts, 311; *United States* v. *Zucker*, 161 U. S. 475; *United States* v. *Atlantic Coast Line*, 173 Fed. Rep. 764; *United States* v. *Southern Pacific Co.*, 162 Fed. Rep. 412; *United States* v. *Southern Pacific Co.*, 157

Fed. Rep. 459; *United States* v. *Boston & Albany R. Co.*, 15 Fed. Rep. 209.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case brings up two suits that were consolidated and tried together, both being suits for penalties under the Hours of Service Act of March 4, 1907, c. 2939, 34 Stat. 1415, for keeping employés on duty for more than sixteen consecutive hours. The main question is whether, when several persons thus are kept beyond the proper time by reason of the same delay of a train, a separate penalty is incurred for each or only one for all. The Circuit Court of Appeals decided for the Government without discussion.

The petitioner cites many cases in favor of the proposition that generally, when one act has several consequences that the law seeks to prevent, the liability is attached to the act, and is but one. It argues that the delay of the train was such an act and that the principle, which is a very old one, applies. *Baltimore & Ohio Southwestern R. R. Co.* v. *United States*, 220 U. S. 94. But unless the statute requires a different view, to call the delay of the train the act that produced the wrong, is to beg the question. See *Memphis & Charleston R. R. Co.* v. *Reeves*, 10 Wall. 176. *Denny* v. *New York Central R. R. Co.*, 13 Gray, 481. The statute was not violated by the delay. That may have made keeping the men overtime more likely, but was not in itself wrongful conduct *quoad hoc*. The wrongful act was keeping an employé at work overtime, and that act was distinct as to each employé so kept. Without stopping to consider whether this argument would be met by the proviso declaring a 'delay' in certain cases not to be within the statute, it is enough to observe that there is nothing to hinder making each consequence a separate cause of action or offence, if by its proper construction the law does so; see *Flemister* v. *United States*, 207 U. S. 372,

375; so that the real question is simply what the statute means. The statute makes the carrier who permits 'any employé' to remain on duty in violation of its terms, liable to a penalty 'for each and every violation.' The implication of these words cannot be made much plainer by argument. But it may be observed as was said by the Government that as towards the public every overworked man presents a distinct danger, and as towards the employés each case of course is distinct. *United States* v. *St. Louis Southwestern Ry. Co.*, 184 Fed. Rep. 28; *People* v. *Spencer*, 201 N. Y. 105, 111.

One of the delays was while the engine was sent off for water and repairs. In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period and that if it be deducted, they were not kept more than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive. Their duty was to stand and wait. *United States* v. *Chicago, M. & P. S. Ry. Co.*, 197 Fed. Rep. 624, 628; *United States* v. *Denver & R. G. R. Co.*, 197 Fed. Rep. 629.

It is urged that in one case the delay was the result of a cause, a defective injector, that was not known to the carrier, and could not have been foreseen when the employés left a terminal, and that therefore by the proviso in § 3 the act does not apply. But the question was raised only by a request to direct a verdict for the defendant and the trouble might have been found to be due to the scarcity and bad quality of the water, which was well known. See *Gleeson* v. *Virginia Midland Ry. Co.*, 140 U. S. 435. *The Majestic*, 166 U. S. 375, 386.

The statute provides for a penalty not to exceed five hundred dollars. It is argued that the amount of the penalty was for the jury, the proceeding being a civil suit. But the penalty is a deterrent not compensation. The

amount is not measured by the harm to the employés but by the fault of the carrier, and being punitive, rightly was determined by the judge. *United States* v. *Atlantic Coast Line R. Co.*, 173 Fed. Rep. 764, 771. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 178 Fed. Rep. 12, 15.

Judgment affirmed.